Supreme Court, U.S.
FILED
FEB 21 1989
CLERK

No 88-1442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WALTER J. NALLY and MARIA NALLY,

Petitioners,

vs.

GRACE COMMUNITY CHURCH OF THE VALLEY,
a Non-Profit Corporation,
JOHN F. MACARTHUR, JR., L. DUANE REA,
RICHARD A. THOMSON, and LYNN CORY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

1. Do the First Amendment guarantees of freedom of religion immunize a church and its pastors from civil liability in tort for negligence and intentional misconduct in counseling a known depressed and suicidal church member, who commits suicide as a proximate result of the counseling, where the church and its pastors held themselves out as being competent to treat all--including the most serious — types of emotional disturbances and mental illnesses?
2. Does the California Supreme Court's decision not to impose a duty of due care upon religious counselors because of alleged public policy concerns against holding a religious defendant liable in tort violate the Establishment Clause of the First Amendment?

LIST OF PARTIES

The parties to the proceedings below were the Petitioners Walter Nally and Maria Nally and the Respondents, Grace Community Church of the Valley, John F. MacArthur, Jr., L. Duane Rea, Richard A. Thomson, and Lynn Cory. All parties are before this Court.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting Writ 11

Conclusion 16

Appendix (Opinion and Judgment of the California Supreme Court, California Court of Appeal (Nally II), Order for Judgment of Non-Suit by the Los Angeles County Superior Court, Joseph Kalin, J., opinion and Judgment of the California Court of Appeal (Nally I), and the Summary Judgment granted by the Los Angeles County Superior Court, Thomas C. Murphy, J. ..... A-G

TABLE OF AUTHORITIES

Page

Cases

Campbell v. General Motors Corp.,
32 Cal.3d 112, 184 Cal.Rptr. 891, 649
P.2d 224 (1982) 4

Carson v. Facilities Development Co.,
36 Cal.3d 830, 206 Cal.Rptr. 136,
686 P.2d 656 (1984) 4

Cantwell v. State of Connecticut,
310 U.S. 296 (1940) 11

Everson v. Board of Education,
330 U.S. 1 (1947), *rehearing denied*,
330 U.S. 855 11

Lemon v. Kurtzman,
403 U.S. 602, 612-13 (1971), *rehearing denied*
404 U.S. 876 ..... 12, 13

School District of Abington Tp., Pa. v. Shempp,
374 U.S. 203 (1963) 15

Thomas v. Review Board of Indiana Employment Security Div.,
450 U.S. 707, 718 (1981) 14

Widmar v. Vincent,
454 U.S. 263, 270 (1981) 14

Wisconsin v. Yoder,
406 U.S. 205, 215 (1972) 14

Nally v. Grace Community Church,
47 Cal.3d 278, 253 Cal.Rptr. 97,
763 P.2d 948 (1988) ..... passin

Nally v. Grace Community Church,
240 Cal.Rptr.
215 (Cal.App. 1987) 2, 9, 10, 11

Nally v. Grace Community Church,
204 Cal.Rptr. 303 (Cal.App. 1987) 2

Statutes

28 U.S.C.
sec. 1257 2

Constitutions

United States Constitution
1st Amendment ..... passin
14th Amendment 11

In the
Supreme Court of the United States

October Term, 1988

WALTER J. NALLY and MARIA NALLY,

Petitioners,

vs.

GRACE COMMUNITY CHURCH OF THE VALLEY, a Non-Profit Corporation, JOHN F. MacARTHUR, DUANE REA, RICHARD A. THOMSON, JR., and LYNN CORY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioners Walter J. Nally and Maria Nally respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of California entered in the above- entitled case on November 23, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of California is reported at 47 Cal.3d 278, 253 Cal.Rptr. 97, 763 P.2d 948 (1988) and is reprinted in the appendix hereto, page E1, *infra.*

The 1987 opinion of the California Court of Appeal, Second District, Division 7, is unofficially reported at

240 Cal.Rptr. 215 (Cal.App. 1987) and is reprinted in the appendix hereto, page F1, *infra.*

The "Order for Judgment of Nonsuit," signed by the court for the Superior Court of the County of Los Angeles, State of California, Joseph R. Kalin, J., and filed on May 24, 1985, is reprinted in the appendix hereto, page C1, *infra.*

The 1984 opinion of the California Court of Appeal, Second District, Division 1, is unofficially reported at 204 Cal.Rptr. 303 (Cal.App. 1987) and is reprinted in the appendix hereto, page G1, *infra.*

On October 2, 1981, the Superior Court of the County of Los Angeles, State of California, Thomas C. Murphy, J., granted Respondents' motion for a summary judgment, which order is reprinted in the appendix hereto, page B1, *infra.*

JURISDICTION

The jurisdiction of this Court to review the judgment of the Supreme Court of California is invoked under Section 1257 of Title 28 of the United States Code.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the freedoms of religion contained in the First Amendment to the United States Constitution, which provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."

STATEMENT OF THE CASE

On April 1, 1979, 24-year-old Kenneth Nally, the unmarried son of Petitioners Walter Nally and Maria Nally, died as "the immediate result of self inflicted shotgun wounds to the head and brain." The complaint alleged three causes of action against Respondent Grace Community Church and four of its pastors for (1) clergyman malpractice; (2) negligence; and (3) outrageous conduct. The present appeal is from a judgment of nonsuit.

The basis of the clergyman malpractice and negligence actions is that the Respondents, who were treating Kenneth through counseling for depression and suicidal inclinations, should have exercised reasonable care in the counseling of Kenneth and taken appropriate preventive measures to prevent Kenneth's suicide, including, inter alia, the duty to timely and effectively refer Kenneth to a qualified medical mental health care professional who, among other things, could have prescribed medication or initiated involuntary hospitalization. Also included would be the duty to communicate to Kenneth's parents (Petitioners herein) or to Kenneth's doctors Kenneth's expressions of a present desire to commit suicide.

The "outrageous conduct" charge is based upon allegations that Respondents acted recklessly in disregard of Kenneth's emotional state prior to his suicide, knowing that Kenneth Nally was depressed and considering suicide. Petitioners further contend that Respondents encouraged Kenneth to commit suicide, by, among other things, telling Kenneth that

suicide is an acceptable alternative for someone who — like Kenneth — is unable to cope and live with his sins. In so counseling Kenneth under the circumstances of this case, Respondents acted in a wholly irresponsible manner, with utter and complete disregard for Kenneth Nally's life and physical well-being.

The Evidence

From the evidence presented by Petitioners at trial,[1] a jury could have found the following facts to be true:

Kenneth Nally, who had been raised a Catholic and had attended parochial schools while growing up, joined Grace Community Church in 1974 while a student at U.C.L.A. Grace Community Church soon became the focal point of Kenneth's life and was to remain his guiding force until his untimely death five years later. While a member of Grace Community Church, Kenneth Nally approached Respondents and received extensive counseling for his emotional and mental problems from four of the Church's 'pastoral

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[1] Under the traditional rules of appellate review of a judgment of nonsuit, the reviewing court must accept as true the evidence most favorable to the plaintiffs and disregard conflicting evidence. *Carson v. Facilities Development Co.*, 36 Cal.3d 830, 839, 206 Cal.Rptr. 136, 140, 686 P.2d 656 (1984); *Campbell v. General Motors Corp.*, 32 Cal.3d 112, 118, 184 Cal.Rptr. 891, 894, 649 P.2d 224 (1982). As noted by Justice Kaufman in his concurring opinion, however, "The majority has reversed this fundamental principle of appellate review, stating the evidence, resolving all factual conflicts, and drawing all reasonable inferences in favor of *defendants*. . . . [V]iolations of this principle occur throughout the majority opinion." 253 Cal.Rptr. at 114 n.1, (Kaufman, J., concurring) (emphasis in original).

counselors,' all Respondents herein: Senior Pastor John F. MacArthur, Jr., and Pastors L. Duane Rea, Richard A. Thomson, and Lynn Cory.

Grace Community Church holds itself out not only to church members but to the general public as well as being competent to treat not only problems of a spiritual nature, but all mental illnesses and emotional disturbances, including the most serious mental illnesses such as psychosis, schizophrenia, depression, and suicidal ideations. Notwithstanding these claims, Grace Community Church does not require its counselors to have any formal education in counseling or psychology. Despite the obvious lack of even a rudimentary background in this field, Respondents considered themselves both "qualified and experienced" in treating severely depressed and suicidal individuals, including Kenneth Nally.

Grace Community Church operates an extensive counseling program,[2] with some *50 counselors* on staff

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[2] This is the clearest example of the majority opinion's reversal of the established rules of appellate review, by accepting Respondent MacArthur's testimony that "Grace Community Church does not have a professional or clinical counseling ministry. We don't run a counseling center as such. We aren't paid for that, and we don't solicit that." 253 Cal.Rptr. at 99. The majority opinion of the California Supreme Court chose to ignore Petitioners' substantial evidence that Respondents operated an extensive counseling center. Such evidence included the number of counselors on staff (up to 50), advertisements of Grace Community Church to members and to the general public of its counseling services, and the fact that one church secretary's job included the scheduling of counseling sessions. As Associate Justice Kaufman noted in his concurring opinion, "The picture which emerges from the record is decidedly not that of a small

at the time in question. The 1979 annual report of Grace Community Church expressly stated that pastoral counseling constituted "a very important part of the ministry at Grace Church." That same report stated that about 50 percent of the people seeking counseling came from outside the Church.

Well over one year before his death, Respondents knew that Kenneth Nally was depressed and thinking of suicide. Indeed, it was common knowledge among all of the pastors at Grace Community Church that Kenneth was depressed and suicidal.

In late February or early March, 1979, Kenneth was counseled by Respondent Richard A. Thomson. Kenneth told Thomson of his inability to cope and confided in Thomson that he had considered suicide before. Respondent Thomson felt there was an "intimation" of suicide and that he took such intimations "seriously." Thomson, though having little formal education in this field (he had had but one college course in psychology), considered himself competent and experienced in counseling deeply depressed and suicidal individuals, continued to counsel Kenneth, and because of his self-professed

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band of simple pastors who offered occasional counseling on minor matters to the faithful few." 253 Cal.Rptr. at 113 (Kaufman, J., concurring).

At the very least, the evidence presented by Petitioners at trial conflicted with Respondent MacArthur's self-serving testimony and presented a question for the trier of fact to decide. The evidence that the Church did not run a counseling center or engage in counseling was not so overwhelming as to lead reasonable minds to no other conclusion but that the Church was not "in the counseling business."

expertise, did not refer Kenneth to mental health care professional.

Shortly thereafter, in March of 1979, Kenneth attempted suicide. While hospitalized, Kenneth told his treating doctors and his parents that he was sorry he had attempted suicide and would not try it again. However, Kenneth told Respondents MacArthur and Rea, who visited Kenneth in the hospital, that he was sorry he hadn't succeeded and would try to take his own life again when released. Neither of these two Respondents, nor Respondent Cory who overheard the remarks, communicated Kenneth's statements to his doctors or family.

Based on the information available to them, including Kenneth's statements of regret over having tried to take his own life, Petitioners decided not to initiate involuntary commitment proceedings. Although there is a general risk that a person who has attempted suicide may try it again, and which risk is considered by mental health professionals in deciding what treatment would be best for the suicidally-inclined individual, neither Kenneth's doctors nor Petitioners were aware of Kenneth's *specific expressed intentions of attempting suicide again* once he was released from the hospital. Had Respondents conveyed to Petitioners or to Kenneth's doctors this vital information, the decision not to involuntarily hospitalize Kenneth would have been different. Kenneth would have been placed in a protective environment where he would have received appropriate care and supervision.

After he was released from the hospital, Kenneth was counseled by Thomson three more times. During

these counseling sessions, Kenneth told Thomson of his continued thoughts of suicide, leading Thomson to conclude that Kenneth's suicide was a "possibility" which Thomson continued to take "seriously."

Immediately after being released from the hospital in March, 1979 after his suicide attempt, Kenneth went to stay at the home of Respondent John F. MacArthur, Jr. During his week-long stay at MacArthur's home, Kenneth and MacArthur had long discussions during which Kenneth discussed his depression and thoughts of suicide. Respondent MacArthur became convinced that there was a "real possibility" that Kenneth would commit suicide.

In the two- to three-week interval between his release from the hospital and his death, and as part of his counseling with Respondents, Kenneth made several inquiries of Respondents as to whether or not a person who commits suicide goes to heaven. This was a particularly important issue to Kenneth in light of his Catholic upbringing, which taught that suicide is the ultimate sin which would bar entry into heaven and damn the suicide to an eternity in hell. In response to Kenneth's specific requests regarding the eternal life of a suicide, and with knowledge that Kenneth was seriously depressed and suicidal, Respondents told Kenneth that if he was a believer, he would go to be with the Lord, that suicide was one of the ways that the Lord takes home a disobedient believer. Respondents encouraged Kenneth to commit suicide by telling him that suicide was an acceptable alternative for someone unable to live with his sins — someone like Kenneth Nally.

On the morning of April 1, 1979, Kenneth Nally, no longer able to cope with his worsening depression and growing feelings of despair, walked into a closet in the home of a friend, closed the door, and put a shotgun to his head and pulled the trigger.

The Rulings Below

The three-count complaint in this action was filed on March 31, 1980. On June 30, 1980, the Los Angeles County Superior Court, the Honorable Thomas C. Murphy, Judge Presiding, overruled Respondents' demurrer. On October 2, 1981, Judge Murphy granted Respondents' motion for summary judgment.

The trial court's granting of Respondents' motion for summary judgment was timely appealed, and on June 28, 1984, the California Court of Appeal, Second District, Division 1, reversed, holding that the Petitioners had stated a cause of action for "outrageous conduct" and that the First Amendment guarantees of freedom of religion did not insulate Respondents from liability therefor. 240 Cal.Rptr. 215 (Cal.App. 1987). Having concluded that the complaint stated a viable cause of action, the court did not address the negligence and malpractice allegations. The California Supreme Court denied a hearing and depublished the *Nally I* opinion.

On remand, trial commenced in the Superior Court, County of Los Angeles, State of California, Joseph Kalin, J., presiding. At the close of plaintiff's evidence, the court granted Respondents' motion for nonsuit on all counts.

Petitioners appealed this ruling to the California Court of Appeal, Second District, Division 7. On September 16, 1987, the Second District Court of Appeal held that:

> religious counselors, along with secular counselors, have a duty with regard to suicide counselees. In appropriate cases, . . . a jury could reasonably find the standard of care can be satisfied only by placing a suicidal counselee in the hands of those best able to prevent these counselees from killing themselves. This by no means should be construed to require the religious counselors to disengage, however. There is no duty for them to abandon their counseling or to stop giving them religious counseling. The legal responsibility, where it exists, is instead in the affirmative--to insure their counselees also are under the care of psychotherapists, psychiatric facilities, or others authorized and equipped to forestall an imminent suicide. The church's duty to train its counselors as to suicide prevention, in turn, is dependent upon and coextensive with the counselors' duty toward suicidal counselees. Since we hold the counselors have the duty as outlined above, the Church has a companion duty to insure its counselors are aware of these responsibilities and how to discharge them. . . .

240 Cal.Rptr. at 228-229.

The Court of Appeal in *Nally II* also found that the evidence presented at trial was sufficient to withstand a motion for nonsuit. 240 Cal.Rptr. at 229. Addressing

the issue of whether the First Amendment freedoms of religion immunized the Respondents, the court concluded that they did not. 240 Cal.Rptr. at 230-237.

Respondents appealed to the Supreme Court of California, which, on November 23, 1988, reversed, holding that the Respondents owed no duty to Petitioners or their son, as public policy favored that "access to the clergy for counseling should be free from state imposed counseling standards . . .." 253 Cal.Rptr. at 108-09. It is from this ruling that Petitioners seek a writ of certiorari to the Supreme Court of California.

REASONS FOR GRANTING THE WRIT

This is not an ordinary tort case. For nearly ten years, the eyes of all religious communities and all other counselors and mental health care professionals — indeed, the entire nation — have been focused intently on the *Nally* case. This case offers the United States Supreme Court the unique opportunity to establish guidelines for holding churches and pastors liable for their counseling without running afoul of the First Amendment.

The First Amendment[3] freedoms of religion have played an essential and necessary role in this case from the time the Respondents first asserted the First Amendment as a defense in their answer to the

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[3] The fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment, thereby making the Free Exercise Clause, *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940), and the Establishment Clause, *Everson v. Board of Education*, 330 U.S. 1 (1947), rehearing denied 330 U.S. 855, applicable to the States.

complaint. Both California Court of Appeal decisions in this case considered the applicability of the First Amendment guarantees vital to their holdings; both concluded that the First Amendment did *not* insulate Respondents from liability for tortious conduct in their counseling services.

The Supreme Court of California also considered the First Amendment freedoms of religion as an essential and necessary element in deciding not to impose a duty of care upon Respondents. 253 Cal.Rptr. at 108-109. The California Supreme Court's decision holds that public policy dictates against imposing a duty of care upon Respondents because of First Amendment concerns. This immunity from tort liability recognized by the California Supreme Court applies not only to religious counseling on matters of a spiritual nature, but religious counseling of a purely psychological (secular) nature as well.

Imposing a Minimum Standard of Care Applicable to All Counselors Would Violate Neither the Establishment Clause Nor the Free Exercise Clause

Requiring religious counselors to refer a suicidal counselee to a mental health care professional would not violate the Establishment Clause of the First Amendment when subjecting the duty to the scrutiny of the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), *rehearing denied* 404 U.S. 876.

First, the duty would have the direct secular purpose of protecting and preserving human life, health, welfare, and public safety.

Second, the principal or primary act of such duty would neither advance nor inhibit religion, particularly in this case where Respondents' religious tenets do not prohibit medical or psychiatric intervention. As Justice Kaufman wrote in his concurring opinion, imposing a duty to advise a suicidal counselee to seek medical care "is religiously *neutral.* Defendants are not exposed to liability for refusing to counsel contrary to their religious beliefs or for affirmatively counseling in conformity with their beliefs." 253 Cal.Rptr. at 119 (Kaufman, J., concurring).

Third, imposition of a duty to exercise due care would not foster an excessive government entanglement with religion, as the inquiry would relate solely to whether the pastoral counselor knew the counselee was suicidal, and if so whether the pastoral counselor adequately referred the counselee to appropriate mental health care professionals or otherwise took reasonable steps to prevent the suicide or suicide attempt. *None of this involves an inquiry into Respondents' religious beliefs.*

Even if there is some entanglement between State and religion, this Court has recognized that "[s]ome relationship between government and religious organizations is inevitable." *Lemon v. Kurtzman, supra,* 403 U.S. at 614. The "wall of separation" between church and state, "far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman, supra,* 403 U.S. at 614. The less compelling the state's interest, the higher and more solid the wall of separation becomes; conversely, the more compel-

ling the state's interest, the lower and less solid the wall of separation becomes.

Imposing a duty of care upon religious counselors would not violate Respondents' rights under the Free Exercise clause of the First Amendment, as such duty is narrowly drawn to provide the least restrictive means of achieving the compelling State interest in protecting human life. *See Widmar v. Vincent*, 454 U.S. 263, 270 (1981); *Thomas v. Review Board of Indiana Employment Security Div.*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

If there is any encroachment upon Respondents' religious freedoms by imposing a duty of care upon religious counselors, such encroachment would be minimal and certainly justified by the state's not merely compelling but *paramount* interest in preserving and protecting human life.

As Justice Kaufman noted in his concurring opinion:

> . . . [S]ociety's interest in preserving the life of a would-be suicide is as profound as its interest in preserving life generally. To this end, society surely may require a pastoral counselor who invites and undertakes a counseling relationship with an individual in whom he recognizes suicidal tendencies, to advise that individual to seek competent medical care.

253 Cal.Rptr. at 119 (Kaufman, J., concurring).

Imposing a duty to effectively refer a suicidal counselee to appropriate mental health care professionals would not require the termination of pastoral counseling. Religious or spiritual counseling could continue as an important adjunct to "secular"

medical or psychological intervention. Indeed, for a pastoral counselor to suddenly and unilaterally terminate counseling upon referring the counselee to a mental health care professional could well cause serious emotional harm to the counselee.

The California Supreme Court's Decision Violates the First Amendment Prohibition Against Establishment of Religion

Under the *Lemon* criteria, it is clear that the California Supreme Court's decision to immunize religious counselors from liability because of public policy considerations violates the Establishment Clause. The principal or primary effect of the California Supreme Court's decision unconstitutionally promotes religion and gives religious counselors a "preferred position" over nonreligious licensed counselors. *See School District of Abington Tp., Pa. v. Shempp*, 374 U.S. 203 (1963).

Although the California Supreme Court's decision claims to apply to all so-called "nontherapist counselors,"[4] this Court should not blind its eyes to the fact

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[4] The California Supreme Court relies heavily on the term "nontherapist counselors" in determining the extent or limitation of liability. This is an unfortunate and misleading misnomer. It appears from the California Supreme Court's decision that "nontherapist counselor" is defined as any counselor other than one licensed under the applicable provisions of the California Business and Professions Code. See, e.g., California Business and Professions Code secs. 2908 (psychologists), 4508 (psychiatric technicians), and 4908.01 and 17800.1 (marriage, family, and child counselors). The fact that a person does not hold a license has little, if any, bearing on whether the counseling he or she provides is

that all but a minuscule percentage of these amorphous "nontherapist counselors" are religious counselors. Indeed, the only type of nonreligious nontherapist counselors mentioned by the California Supreme Court are " 'teen hotlines' which offer only 'bad aid counseling.' " 253 Cal.Rptr. at 108. This type of counseling is a far cry from the counseling offered and provided to Kenneth Nally.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Supreme Court of California should be granted.

Respectfully submitted,

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February 21, 1989

APPENDIX A

APPENDIX A

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 1, Civil No. 67200

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
AUG 30 1984
LAURENCE P. GILL, Clerk
Deputy

IN BANK

NALLY et al., Appellants

v.

GRACE COMMUNITY CHURCH OF THE VALLEY et al., Respondents

Respondent's petition for hearing DENIED.

Mosk, J. and Lucas, J., are of the opinion the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed June 28, 1984, which appears at 157 Cal.App.3d 912. (Cal.Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

Bird, C.J., is of the view the opinion should remain published.

BIRD

Chief Justice

APPENDIX B

APPENDIX B

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

	CASE NUMBER
WALTER NALLY PLAINTIFF(S) VS GRACE COMMUNITY CHURCH DEFENDANT(S)	NCC 18668B NOTICE OF: SUMMARY ☒ ENTRY OF JUDGMENT ☐ FILING OF ORDER OF DISMISSAL

To the above named parties and to their attorneys of record:
You are hereby notified that:

☒ judgment in the above-entitled matter was entered on 10-28-81, Book B122, Page 289

☐ order of dismissal in the above-entitled matter was filed on

JOHN J. CORCORAN, County Clerk and Clerk of the Superior Court of California, County of Los Angeles.

By G Macfarlane Deputy.

CERTIFICATE OF MAILING

I, JOHN J. CORCORAN, County Clerk and Clerk of the Superior Court of California, County of Los Angeles, and not a party to the within action, hereby certify; that on 10-28-81 *, 19 , I served the within notice on the parties in the within action, by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid in the United States Post Office mail box in Los Angeles County, California addressed as follows:*

COOKSEY, COLEMAN & HOWARD
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Dated 10-28-81

JOHN J. CORCORAN, County Clerk and Clerk of the Superior Court of California, County of Los Angeles.

By G Macfarlane Deputy.

APPENDIX C

APPENDIX C

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Attorneys for Defendants

FILED
MAY 24 1985
FRANK S. [illegible] N. County Clerk
[illegible]

SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

WALTER J. NALLY and MARIA NALLY,	)	
	)	NC C 18668 B
Plaintiffs,	)	
	)	ORDER FOR
vs.	)	JUDGMENT OF
	)	NON-SUIT
GRACE COMMUNITY CHURCH, et al.,	)	C.C.P. §581c(a)
	)	
Defendants.	)	

The Motion of defendants, GRACE COMMUNITY CHURCH OF THE VALLEY, JOHN F. McARTHUR, JR., DUANE REA, RICH THOMSON,

erroneously sued and served herein as RICH THOMPSON, and LYNN CORY for an Order granting Judgment of Non-Suit pursuant to §581c(a) of the Code of Civil Procedure on Plaintiffs' presentation of evidence was heard by the Court on May 16, 1985. The Defendants appeared by their counsel of record David Cooksey and Samuel Ericsson, and Plaintiffs appeared by counsel or record, Mr. Edward Barker.

Plaintiffs having rested their case and good cause for an Order for Judgment of Non-Suit having been shown,

IT IS ORDERED, ADJUDGED, and DECREED, that the Motion of Defendants be, and hereby is, granted, the Plaintiffs take nothing by the Complaint herein on file, that this Order shall operate as an adjudication on the merits, and that Defendants recover from Plaintiffs their costs in the sum of $18,116.31.

DATED: May 24, 1985

JOSEPH KALIN,
Judge of Superior Court

APPENDIX D

APPENDIX D

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SUPERIOR COURT OF
THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

WALTER NALLY, etc.,	)	
	)	NO. NC C 18668 B
Plaintiffs,	)	
	)	ORDER GRANTING
vs.	)	DEFENDANTS'
	)	MOTION FOR
GRACE COMMUNITY	)	SUMMARY
CHURCH, et al.,	)	JUDGMENT
	)	AND SUMMARY
Defendants.	)	JUDGMENT
	)	

THE MOTION OF defendants JOHN MacARTHUR, GRACE COMMUNITY CHURCH OF THE VALLEY, DUANE REA, LYNN CORY and RICH

THOMSON for an order dismissing the Complaint herein and entering judgment for sad defendants came on regularly for hearing before me on October 2, 1981. Robert Long appeared as counsel for plaintiff, Sam Ericsson appeared as counsel for defendant JOHN MacARTHUR, and David Cooksey appeared as counsel for defendants GRACE COMMUNITY CHURCH OF THE VALLEY, DUANE REA, LYNN CORY and RICH THOMSON. The Court examined the declarations submitted in support of and in opposition to said motion, and the matter was argued and submitted.

The Court being fully advised herein and good cause appearing therefore;

IT IS ORDERED that defendants' motion herein and it is granted.

IT IS FURTHER ORDERED, adjudged, and decreed that the Complaint herein be, and it is, dismissed and that defendants recover from plaintiff their costs in the sum of $

DATED:

_____

Judge of Superior Court

APPENDIX E

APPENDIX E

Walter J. NALLY et al., Plaintiffs and Appellants,

v.

GRACE COMMUNITY CHURCH OF THE VALLEY et al., Defendants and Respondents.

No. S002882.

Supreme Court of California, In Bank.

Nov. 23, 1988.

Parents whose son committed suicide brought action against church and church-related counselors alleging negligent counseling and outrageous conduct. On remand, the Superior Court, Los Angeles, Joseph R. Kalin, J., entered nonsuit, and appeal was taken. The Court of Appeal, Johnson, J., 240 Cal.Rptr. 215, reversed and remanded, and review was granted, superseding opinion of Court of Appeal. The Supreme Court, Lucas, C.J., held that pastoral, nontherapist counselors had no duty to refer potentially suicidal person to professional therapist, and thus could not be held liable in negligence following person's suicide.

Court of Appeal reversed and directed to enter judgment affirming Superior Court.

Kaufman, J., concurred and filed opinion in which Broussard, J., joined.

1. Trial §139.1(16)

Defendant is entitled to nonsuit if trial court determines that, as matter of law, evidence presented by plaintiff is insufficient to permit jury to find in his favor.

2. Appeal and Error §927(3), 997(2)

Supreme Court will not sustain judgment granting nonsuit unless interpreting evidence most favorably to plaintiff's case and most strongly against defendant, and resolving all presumptions, inferences and doubts in favor of plaintiff, judgment for defendant is required as matter of law.

3. Negligence §1

To prove facts sufficient to support finding of negligence, plaintiff must show that defendant had duty to use care, that he breached that duty, and that breach was proximate or legal cause of resulting injury.

4. Negligence §2

One is ordinarily not liable for actions of another and is under no duty to protect another from harm, absent special relationship of custody or control.

5. Death §33
Religious Societies §30

Pastoral, nontherapist counselors had no duty to refer potentially suicidal person to professional therapist, and thus could not be held liable in negligence following person's suicide; though counselors may have known of potential for suicide, counselors had no special relationship with person over whose environment they had no control.

6. Damages §50.10

Elements of cause of action for intentional infliction of emotional distress are: outrageous conduct by defendant, intention by defendant to cause or reckless disregard of probability of causing emotional distress, severe emotional distress, and actual and proximate causal link between tortious conduct and emotional distress.

7. Appeal and Error §1097(1), 1195(1, 4)

Under "law of the case" doctrine, decision of appellate court, stating rule of law necessary to decision of case, conclusively establishes that rule and makes it determinative of rights of same parties in any subsequent retrial or appeal of same case; rule does not apply to points of law that might have been, but were not determined on prior appeal or where sufficiency of evidence necessary to sustain judgment depends upon probative value or effect of evidence itself, and evidence in second trial has changed.

See publication Words and Phrases for other judicial constructions and definitions.

8. Appeal and Error §1097(1)

Law of the case doctrine does not preclude court hearing subsequent appeal from reconsidering initial appellate ruling where subsequent court determines that there should be reversal on ground that was not considered on prior appeal.

9. Religious Societies §31(5)

Tape recording of church pastor's classroom comments, to effect that person who commits suicide could still go to heaven, was properly excluded in negligence action brought against pastor by parents of

person who had been counseled by pastor and had later committed suicide; tape was made almost two years after suicide at issue and was only marginally relevant to prove what was said by pastor when he counseled person. West's Ann.Cal.Evid. Code §352.

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LUCAS, Chief Justice.

I. INTRODUCTION

On April 1, 1979, 24-year-old Kenneth Nally (hereafter Nally) committed suicide by shooting himself in the head with a shotgun. His parents (hereafter plaintiffs) filed a wrongful death action against Grace Community Church of the Valley (hereafter Church), a Protestant Christian congregation located in Sun Valley, California, and four Church pastors: MacArthur, Thomson, Cory and Rea (hereafter collectively referred to as defendants), alleging "clergyman malpractice," i.e., negligence and outrageous conduct in failing to prevent the suicide. (See Code Civ.Proc., §377.) Nally, a member of the Church since 1974, had participated in defendants' pastoral counseling programs prior to his death.

This case was previously before us in 1984 after the Court of Appeal reversed summary judgment for defendants and remanded to the trial court (hereafter *Nally I*). After we denied a hearing and depublished the *Nally I* Court of Appeal opinion, the matter was send back to the trial court. At the close of plaintiffs' evidence at the trial on remand, the court granted defendants' motion for nonsuit on all counts on the basis of insufficiency of the evidence.[1]

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[1] Code of Civil Procedure section 581c provides in relevant part: "(a) After the plaintiff has completed his or her opening statement, or the presentation of his or her evidence in a trial by jury, the defendant, without waiving his right to offer evidence in

The Court of Appeal again reversed and we granted review to address: (i) whether we should impose a duty on defendants and other "nontherapist counselors" (i.e., persons other than licensed psychotherapists, who counsel others concerning their emotional and spiritual problems) to refer persons to licensed mental health professionals once suicide becomes a foreseeable risk, and (ii) whether the evidence presented at trial supports plaintiffs' cause of action for wrongful death based on defendants' alleged "intentional infliction of emotional distress" on Nally.

II. FACTS

A. *Background*

In 1973, while attending University of California at Los Angeles (hereafter UCLA), Nally became depressed after breaking up with his girlfriend. He often talked about the absurdity of life, the problems he had with women and his family, and he occasionally mentioned suicide to his friends. Though Nally had been raised in a Roman Catholic household, he converted to Protestantism while he was a student at UCLA, and in 1974 he began attending the Church, the largest Protestant church in Los Angeles County. Nally's conversion became a source of controversy between him and his family. During this time, Nally developed a close friendship with defendant Pastor Cory, who was responsible for overseeing the ministry

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the event the motion is not granted, may move for a judgment of nonsuit. . . . [1](c) If the motion is granted, unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits."

to the collegians attending the Church. On occasion, Nally discussed his problems with Cory, but the two never established a formal counseling relationship. Between 1974 and 1979, Nally was active in defendants' various Church programs and ministries.

Defendants offered pastoral counseling to church members in matters of faith, doctrine and the application of Christian principles. During 1979, defendant Church had approximately 30 counselors on its staff, serving a congregation of more than 10,000 persons. Defendants taught that the Bible is the fundamental Word of God containing truths that must govern Christians in their relationship with God and the world at large, and in their own personal lives. Defendant Church had no professional or clinical counseling ministry, and its pastoral counseling was essentially religious in nature. Such counseling was often received through instruction, study, prayer and guidance, and through mentoring relationships called "discipleships." According to the trial testimony of defendant Senior Pastor MacArthur, "Grace Community Church does not have a professional or clinical counseling ministry. We don't run a counseling center as such. We aren't paid for that, and we don't solicit that. We just respond as pastors, so what we do is on a spiritual level, and a biblical level, or a prayer level. . . ." In essence, defendants held themselves out as *pastoral* counselors able to deal with a variety of problems — not as professional, medical or psychiatric counselors.

In 1975, Nally was seeing a secular psychologist to discuss problems he was having with his girlfriend. After graduating from UCLA in 1976, he spent one semester at Biola College in La Mirada and was

enrolled in the Talbot Theological Seminary's extension on defendants' church grounds. During this time, Nally became involved in a relationship with a girlfriend who was a fellow Bible student. In January 1978, he established a "discipling relationship" with Pastor Rea with whom he often discussed girlfriend and family problems. They met five times in early 1978, but when Nally lost interest in "discipling," the meetings were discontinued.[2]

Following the breakup with his girlfriend in December 1978, Nally became increasingly despondent. Pastor Cory encouraged him to seek the counsel of either Pastor Thomson or Rea. The friendship with Cory and the five discipling sessions with Rea in early 1978, constituted the full extent of the "counseling" Nally received from defendants before the spring of 1979.

In February 1979, Nally told his mother he could not "cope." She arranged for him to see Dr. Milestone, a general practitioner, who prescribed Elavil, a strong anti-depressant drug, to relieve his depression. Milestone also recommended Nally undergo a series of blood and chemical tests. The record reveals that Milestone never referred Nally to a psychiatrist.

By late February, Nally's depression did not appear to be subsiding, and he was examined by Dr. Oda, a physician, who did not prescribe medication or refer

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[2] Contrary to statements in Justice Kaufman's concurrence, our review of the record reveals that Rea did not become aware Nally could not cope in the *physical* sense until *after* his suicide attempt. Indeed, the record, when viewed in context, shows that when Nally told Pastor Rea that he "could not cope" and just could not "live this life," he was referring to leading the "*Christian* life."

Nally to a psychiatrist, but suggested he undergo a physical examination. Shortly thereafter, Nally spoke briefly in a drop-in counseling session with Pastor Thomson about the marital tensions between his parents and his problems with his current girlfriend. He told Thomson that he had considered suicide in 1974 while a student at UCLA.[3] The record shows that Thomson's conversation with Nally focused on their common faith in scripture. During this time, Nally "decided to serve the Lord through law," and was accepted at a Southern California law school for the 1979 fall semester.

B. *The Events Preceding Nally's Suicide*

On March 11, 1979, Nally took an overdose of the antidepressant prescribed by Dr. Milestone. Plaintiffs found him the following day and rushed him to a hospital. At the hospital, Dr. Evelyn, Nally's attending physician, advised plaintiffs that because their son "was actually suicidal," she could not authorize his release from the hospital until he had seen a psychiatrist. The record indicates that plaintiffs, concerned about their friends' reactions to their son's suicide attempt, asked Dr. Evelyn to inform other persons that Nally had been hospitalized only for the aspiration pneumonia he suffered after the drug overdose rendered him unconscious.

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[3] Our review of the record reveals that although Thomson recalled that Nally mentioned he had considered suicide while a student at UCLA, and concluded there was a "vague possibility" that Nally could consider suicide in the future, he did not believe Nally's "intimation of suicide" gave rise to a "serious enough likelihood where other help would be needed at [that] point."

On the afternoon of March 12, Pastors MacArthur and Rea visited Nally at the hospital. Nally, who was still drowsy from the drug overdose, separately told both pastors that he was sorry he did not succeed in committing suicide. Apparently, MacArthur and Rea assumed his entire hospital staff was aware of Nally's unstable mental condition, and they did not discuss Nally's death-wish comment with anyone else.

Four days later, Dr. Hall, a staff psychiatrist at the hospital, examined Nally and recommended he commit himself to a psychiatric hospital. When both Nally and his father expressed reluctance at the thought of formal commitment, Hall agreed to release Nally for outpatient treatment, but warned Nally's father that it would not be unusual for a suicidal patient to repeat his suicide attempt. Nally was released from the hospital by Drs. Hall and Evelyn the next day.

On his release from the hospital on March 17, 1979, Nally arranged to stay with Pastor MacArthur, because he did not want to return home. MacArthur encouraged Nally to keep his appointments with Dr. Hall, and arranged for him to see Dr. John Parker, a physician and Church deacon, for a physical examination. Parker's testimony reveals that Nally told him he was depressed, had entertained thoughts of suicide, and had recently taken an overdose of Elavil. After examining Nally, Parker believed he was a continuing threat to himself, and recommended Nally commit himself to a psychiatric hospital. Nally, however, immediately rejected the advice.

Parker testified that after Nally left his office, he telephoned Glendale Adventist Hospital to determine whether any beds were available. He then informed Nally's father that Nally needed acute psychiatric care

and that he should contact Glendale Adventist Hospital for information concerning the psychiatric facilities. That same evening, Nally's father telephone Dr. Hall and told him that Parker had recommended psychiatric hospitalization. Hall offered to come to the Nally residence and arrange for Nally's involuntary commitment; the offer was rejected by plaintiffs. The record shows that Mrs. Nally strongly opposed psychiatric hospitalization for her son, saying, "no, that's a crazy hospital. He's not crazy."

Eleven days before his suicide, Nally met with Pastor Thomson for spiritual counseling. According to the record, Nally asked Thomson whether Christians who commit suicide would nonetheless be "saved." Thomson referred Nally to his training as a seminary student and acknowledged "a person who is once saved is always saved," but told Nally that "it would be wrong to be thinking in such terms." Following their discussion, Thomson made an appointment for Nally to see Dr. Bullock for a physical examination but did not refer Nally to a psychiatrist.

Several days later, Nally moved back home. During his final week of life, he was examined separately by Drs. Bullock and Evelyn. Dr. Bullock testified that he was concerned with Nally's physical symptoms. (Nally complained of headaches and of the fact that his arm was paralyzed because he had slept on it while he was unconscious following the Elavil overdose.) Bullock suggested to Nally that he admit himself to the hospital. Bullock, however, did not refer Nally to a psychiatrist; instead, he subsequently conferred with Dr. Evelyn, and both doctors agreed Nally needed further physical and possibly psychiatric evaluation.

The day after his visit with Bullock, Nally encountered Pastor Thomson in the Church parking lot. Nally told Thomson that he was thinking of seeing a psychologist. Thomson recommended Nally contact Dr. Mohline, Director of the Rosemead Graduate School of Professional Psychology. The following day, Nally spent approximately 90 minutes with Mohline, who in turn referred him to the Fullerton Psychological Clinic. Nally and his father went to the clinic the next day, and Nally discussed possible therapy with Mr. Raup, an registered psychologist's assistant. Raup testified he believed that Nally was "shopping for a therapist or counselor or psychologist" and that he was not going to return to the clinic. At the end of the week, Nally met with a former girlfriend. She turned down an apparent marriage proposal by telling Nally, "I can't marry you when you are like this. You have got to pull yourself together. You have got to put God first in your life." The next day, Nally left plaintiffs' home following a family disagreement. Two days later, he was found in a friend's apartment, dead of a self-inflicted gunshot wound.

III. PROCEDURAL BACKGROUND

A. *Allegations of the Complaint*

As stated above, the *Nally I* Court of Appeal reversed, in published opinion, a summary judgment for defendants. In the first two counts of the complaint, alleging wrongful death based on "clergyman malpractice" and negligence, plaintiffs asserted that defendant Church was negligent in the training, selection and hiring of its spiritual counselors. Plaintiffs also claimed that following Nally's suicide attempt by drug

overdose, defendants failed to make themselves available to Nally for counseling and "actively and affirmatively dissuaded and discouraged [Nally] from seeking further professional psychological and/or psychiatric care."

The third count incorporated the negligence allegations by reference and charged defendants with outrageous conduct for teaching certain Protestant religious doctrines that conflicted with Nally's Catholic upbringing and which "otherwise exacerbated" Nally's "pre-existing feelings for guilt, anxiety and depression." (In this context, plaintiffs claimed one of the defendants told Nally that his temporarily paralyzed arm caused by his suicide attempt was "God punishing him" for his sin.) Plaintiffs also alleged that defendants' conduct in counseling Nally was outrageous because they "taught or otherwise imbued [Nally], whom the knew to be depressed and having entertained suicidal thoughts, with the notion that if he had accepted Jesus Christ as his personal savior, [he] would still be accepted into heaven if he committed suicide." Here, plaintiffs relied on Thomson's statement to Nally 11 days before his suicide that one who is saved is "always saved," and on a short passage taken from a 12-part tape recorded series, entitled "Rich Thomson: Principles of Biblical Counseling," that was a recording of Pastor Thomson's 1980 classroom lectures to seminary students.

The tape-recorded passage was recorded 18 months *after* Nally's suicide and stated, in pertinent part: "And the suicidal says, 'I am under such tremendous pressure, now I've got to have pleasure of release! Now! I don't care about the future! That's characteristic of human nature. So it is very characteristic of the

suicidal that it is his fear of judgment that drives him into the death after which he will fact that judgment, if he's an unbeliever. And after which, if he is a believer, he'll go to be with the Lord. . . "

B. *Procedural History*

After considering the above evidence, the trial court granted summary judgment on the basis that plaintiffs had failed to raise a triable issue of fact. The trial court stated at the time of the ruling, "Religion has nothing to do with this case."

Although the Court of Appeal in *Nally I* reversed the summary judgment, it did not separately discuss the first two counts alleging "clergyman malpractice" and negligence, but instead focused on the third cause of action fro wrongful death based on intentional infliction of emotional distress. The court held the third cause of action was adequately pleaded and triable issues of fact remained as to whether Nally's suicide was caused by defendants' allegedly outrageous conduct. It based reversal on (i) a declaration of Nally's father that after Nally's hospitalization in March 1979, he opened Pastor Cory's office door during one of the pastor's counseling sessions with Nally and found Nally on his knees crying and (ii) on the deposition testimony of Pastor MacArthur that spiritual counseling (such as he gave Nally) could potentially cause "the deepest depression." In addition, the court relied on the tape excerpt, quoted in part above, as raising a reasonable inference defendants followed a policy of counseling suicidal persons that suicide was an acceptable alternative to living. The *Nally I* court rejected defendants' First Amendment defense to the admissibility of the tape — that the free exercise of religion clause forbids imposing liability

merely because a church teaches suicide does not lead to eternal damnation.

Following the Court of Appeal's decision in *Nally I*, defendants petitioned this court for review. We denied review and depublished the opinion. The case was returned to the trial court.

At trial after remand, four experts testified for plaintiffs regarding the general standard of care to be followed by the counseling community when dealing with a suicidal individual. Each witness testified that although standards varied among secular and denominational counselors, a counselor has a duty to investigate the counseled person's suicidal tendencies and to encourage that person to seek professional help once suicide becomes foreseeable. Although plaintiffs attempted to show that defendants violated these standards, the suggested standards are vague and dependent on the personal predilections of the individual counselor or denomination, and not officially or formally adopted by any organized body of counselors.[4]

Plaintiffs introduced several counseling manuals that were apparently sold in the Church bookstore as supporting an inference that defendants advertised that its counselors were competent to treat a myriad of emotional problems, and as evidence of defendants'

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[4] The trial court refused to allow a witness from the American Pastoral Counseling Association to testify about the standards of care imposed by the association on member counselors. The court noted that defendants did not belong to the association, and that the group had not been accepted by the general pastoral counseling community as experts in the field of pastoral counseling. In any event, the record fails to indicate that defendants violated the foregoing unofficial rules of conduct.

inadequate training as counselors. The manuals, however, while advocating "If a problem is not organically caused . . . the counselor can, with full assurance look to God's Word for its proper solution," do not appear to have presented defendants as anything other than pastoral counselors.

In ruling on the nonsuit motion, the trial court noted that Nally voluntarily sought defendants' counsel and that the court had no compelling reason to interfere in defendants' pastoral activities. The court stated: "There is no compelling state interest to climb the wall of separation of church [and state] and plunge into the pit on the other side that certainly has no bottom." The court also found that even if the law were to impose a "duty to refer," as urged by plaintiffs, the evidence failed as a matter of law to show a breach of such duties and also failed as a matter of law, to prove that defendants' conduct was the proximate cause of Nally's death. Moreover, the court excluded, under Evidence Code section 352,[5] the tape-recorded excerpt from Pastor Thomson's lecture series that *Nally I* had deemed essential to sustain the third count. In excluding the evidence, the trial court specifically stated that consideration of the tape would not have affected its ultimate finding.

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[5] Section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "The discretion granted the trial court by section 352 is not absolute [citations] and must be exercised reasonably in accord with the facts before the court." (*Brainard v. Cotner* (1976) 59 Cal.App.3d 790, 796, 130 Cal.Rptr. 915.)

The Court of Appeal again reversed, holding that although the "clergyman malpractice" count failed to state a cause of action separate from the "negligence" count, both could be construed as stating a cause of action for the "negligent failure to prevent suicide" by "nontherapist counselors." In this context, the Court of Appeal held that nontherapist counselors — *both religious and secular* — have a duty to refer suicidal persons to psychiatrists or psychotherapists qualified to prevent suicides. Moreover, the court held, imposition of a negligence standard of care on pastoral counselors does not impinge on the free exercise of religion guaranteed by the First Amendment, because the state's compelling interest in the preservation of life justifies the narrowly tailored burden on religious expression imposed by such tort liability. Although the Court of Appeal found "the evidence sufficient to sustain a finding [defendant] Church negligently breached its duty to train it's counselors in their responsibilities to refer suicidal counselees or to otherwise insure they were aware of the responsibilities . . .," the court also found that there existed "sufficient evidence in the record for a reasonable person to have concluded some or all of [defendants'] counselors actually exercised reasonable care in attempting to refer [Nally] to mental health professionals authorized and equipped to prevent an imminent suicide."

The Court of Appeal also found that the trial court's grant of nonsuit for insufficiency of the evidence flowed from its erroneous exclusion of the tape-recorded excerpt in which Pastor Thomson discussed his view of suicide and salvation. The Court of Appeal determined that evidence of Thomson's "religious belief" was "highly probative" of his past state of mind and an indication of the content of the religious

counseling he *may* have given Nally. The majority rejected defendants' First Amendment defenses to intentional tort liability, claiming that under the law-of-the-case doctrine, *Nally I* was dispositive on whether the First Amendment would operate to relieve defendants of liability.

Justice Cole dissented, asserting that the majority's holding rested on broad policy determinations best left to the Legislature. The dissent reasoned that the "essence of the duty imposed by the majority is to require the disclosures which existing law has declined to require." Furthermore, the dissent disagreed with the majority's imposition of liability on the third cause of action for wrongful death based on the intentional infliction of emotional distress on Nally, pointing out that the majority "ignored the record" and created an unconstitutional distinction between different ecclesiastic purposes.

Our review of the record reveals the trial court correctly granted a nonsuit as to plaintiffs' causes of action. Neither the evidence adduced at trial nor well-established principles of tort law support the Court of Appeal's reversal of nonsuit in this case. As we explain below, we need not address the constitutional issues posed by defendants.

IV. DISCUSSION

A. *Nonsuit*

[1] A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 117-118, 184 Cal.Rptr. 891, 649,

P.2d 224.) "In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give 'to the plaintiff[s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff[s] favor.' " (Id., at p. 118, 184 Cal.Rptr. 891, 649 P.2d 224.) A mere 'scintilla of evidence" does not create a conflict for the jury's resolution: "there must be *substantial evidence* to create the necessary conflict." (7 Witkin, Cal. Procedure (3d ed. 1985) Trial, §410, p. 413, italics in original.)

[2] In reviewing a grant of nonsuit, we are "guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff." (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839, 206 Cal.Rptr. 136, 686 P.2d 656.) We will not sustain the judgment " 'unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.' " (Ibid., quoting *Mason v. Peaslee* (1959) 173 Cal.App.2d 587, 588, 343 P.2d 805.) Keeping in mind the foregoing standard of review, we now turn to the merits.

B. *Cause of Action for Negligent Failure to Prevent Suicide*

As stated above, the Court of Appeal characterized the first two counts of plaintiffs' complaint (for clergyman malpractice and negligence) as together stating a cause of action for the "negligent failure [by a

nontherapist counselor] to prevent suicide." Conceding that "research [did] not uncover any court decision which has ruled one way or the other specifically on the existence or scope of a *nontherapist counselor's* duty toward suicidal counselees," and that it was venturing "along a largely uncharted path," the Court of Appeal imposed a new and broad duty of care on such counselors without any discussion of causation under the present facts.

As Justice Cole pointed out in his dissent, however, the obligation imposed by the majority is loosely phrased. Indeed, the Court of Appeal used widely varying terminology describing the duty of care arising under the first two causes of action. At different points in the opinion, the Court of Appeal referred to the duty imposed on nontherapist counselors as a duty "to refer counselees to those who possess . . . powers to prevent an imminent suicide"; "to refer . . . to those individuals or institutions authorized and specially suited to prevent suicide"; "to take steps to place [a suicidal person] in the hands of those to whom society has given the authority and who by education and experience are in the best position to prevent the suicidal individual from succeeding in killing himself"; "informing those in a position to prevent the counselee's suicide about the factors suggesting the counselee's imminent plans to kill himself"; "to insure their counselees also are under the care of psychotherapists, psychiatric facilities, or others authorized and equipped to forestall imminent suicide"; and finally, "to take appropriate measures to prevent [a] suicide." As we explain below, we reject the Court of Appeal's imposition of a broad "duty to refer" on defendants and nontherapist counselors in general.

1. Legal Requirements for Imposing a Duty of Care

a) Creation of a Duty

[3] "A tort, whether intentional or negligent, involves a violation of a *legal duty*, imposed by statute, contract or otherwise, owed by the defendant to the person injured. Without such a duty, any injury is 'damnum absque injuria' — injury without wrong. [Citations.]" (5 Witkin, Summary of Cal.Law (10th ed. 1988) Torts, §6, p. 61, italics in original.) Thus, in order to prove facts sufficient to support a finding of negligence, a plaintiff must show that defendant had a duty to use due care,that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury. (*United States Liab. Ins. Co. v. Haidiger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594, 83 Cal.Rptr. 418, 463 P.2d 770.)

[4] Under traditional tort law principles, one is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control. (*Davidson v. City of Westminster* (1982)32 Cal.3d 197, 203, 185 Cal.Rptr. 252, 649 P.2d 894; *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 435, 131 Cal.Rptr. 14, 551 P.2d 334.) Moreover, in determining the existence of a duty of care in a given case, we must consider several factors, including the "foreseeability of harm to [the injured party], the degree of certainty that [he] suffered injury, the closeness of the connection between [defendants'] conduct and the injury suffered, the moral blame attached to [defendants], the policy of preventing future harm, the extent of the burden to the

defendant[s] and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113, 70 Cal.Rptr. 97, 443 P.2d 561.) Thus, because liability for negligence turns on whether a duty of care is owed, our first task is to determine whether a duty exists in the present case.

b) Special Relationship

[5] Although we have not previously addressed the issue presently before us, we have imposed a duty to prevent a foreseeable suicide only when a special relationship existed between the suicidal individual and the defendant or its agents. For example, two cases imposed such a duty in wrongful death actions after plaintiffs proved that the deceased committed suicide in a hospital or other in-patient facility that had accepted the responsibility to care for and attend to the needs of the suicidal patient. (See *Meier v. Ross General Hospital* (1968) 69 Cal.2d 420, 71 Cal.Rptr. 903, 445 P.2d 519; *Vistica v. Presbyterian Hospital* (1967) 67 Cal.2d 465, 62 Cal.Rptr. 577, 432 P.2d 193.) In *Meier*, a cause of action for negligence was held to exist against both the treating psychiatrist and the hospital, and in *Vistica*, liability was imposed on the hospital alone, the only named defendant in the case.

The Court of Appeal here would extend the previously carefully limited precedent, relying initially for the creation of a duty of care (on defendants and other nontherapist counselors) in the foregoing *Meier* and *Vistica* cases. Indeed, the Court of Appeal specifically stated that "Logic and policy both dictate the duty announced in those cases applies to non-

therapist counselors as well." We disagree. As defendants and amici curiae point out, *Meier* and *Vistica* are readily distinguishable from the facts of the present case and, as we explain, severely circumscribe the duty they create.

Both *Meier* and *Vistica* address the issue of a special relationship, giving rise to a duty to take precautions to prevent suicide, in the limited context of hospital-patient relationships where the suicidal person died while under the care and custody of hospital physicians who were aware of the patient's unstable mental condition. In both cases, the patient committed suicide while confined in a hospital psychiatric ward. Liability was imposed because defendants failed to take precautions to prevent the patient's suicide even though the medical staff in charge of the patient's care knew that the patient was likely to attempt to take his own life.

Neither case suggested extending the duty of care to personal or religious counseling relationships in which one person provided nonprofessional guidance to another seeking advice and the counselor had no control over the environment of the individual being counseled. In sharp contrast, Nally was not involved in a supervised medical relationship with defendants, and he committed suicide well over two weeks after he was released from the hospital against the advice of his attending psychiatrist and physician.

Plaintiffs and the Court of Appeal also rely on *Bellah v. Greenson* (1978) 81 Cal.App.3d 614, 620-623, 146 Cal.Rptr. 535, as supporting the existence of a special relationship sufficient to impose a duty of care on nontherapist counselors to refer a counselee to a licensed mental health professional once the potential

suicide becomes foreseeable. As we explain, the Court of Appeal would unduly extend the *Bellah* holding.

In *Bellah*, two years after their daughter's suicide, plaintiffs brought a wrongful death action against a psychiatrist who had been treating the daughter on an out-patient basis. Plaintiffs alleged the existence of a psychiatrist-patient relationship between defendant and their daughter, knowledge on the part of the defendant that their daughter was likely to attempt suicide, and a failure by defendant to take appropriate preventative measures "consonant with good medical practice in the community." (*Bellah*, supra, 81 Cal.App.3d at p. 620, 146 Cal.Rptr. 535.) The Court of Appeal affirmed the trial court's order sustaining defendant's demurrer after concluding that the action was barred by the one-year statute of limitations contained in Code of Civil Procedure section 340.5.

In dictum, the *Bellah* court recognized that although plaintiffs' action was time barred, they had stated a traditional medical malpractice cause of action for the breach of a psychiatrist's duty of care to his patient. *Bellah* stated that this duty may be imposed on the treating psychiatrist even though his patient committed suicide outside the confines of a hospital. (Id., at p. 620, 146 Cal.Rptr. 535.) It is important to recognize, however, that rather than creating a broad duty to refer, the *Bellah* court simply recognized that plaintiffs had stated a "cause of action for the breach by a medical practitioner of the duty of care owed to his patient [which] has long existed in this state." In so doing, *Bellah* distinguished *Meier*, supra, 69 Cal.2d 420, 71 Cal.Rptr. 903, 445 P.2d 519, and *Vistica*, supra, 67 Cal.2d 465, 62 Cal.Rptr. 577, 432 P.2d 193. The court stated: "Obviously, the duty imposed upon those

responsible for the care of a patient in an institutional setting differs from that which may be involved in the case of a psychiatrist treating patients on an out-patient basis." (*Bellah*, supra, at p. 620, 146 Cal.Rptr. 535.) Indeed, *Bellah* concluded that licensed medical professionals simply have no duty to disclose to third persons "vague or even specific manifestations of suicidal tendencies on the part of the patient who is being treated in an out-patient setting. . . ." (*Bellah*, supra, at p. 621, 146 Cal.Rptr. 535.)

In a related context, the *Bellah* plaintiffs claimed that *Tarasoff*, supra, 17 Ca.3d 425, 141 Cal.Rptr. 14, 551 P.2d 334, "created a duty on the part of defendant . . . to breach the confidence of a doctor-patient relationship by revealing to them disclosures made by their daughter about conditions which might cause her to commit suicide." (*Bellah*, supra, 81 Cal.App.3d at p. 620, 146 Cal.Rptr. 535.) The *Bellah* court, however, refused to accept plaintiffs' argument that *Tarasoff* created a new duty on the part of the defendant "to warn others of the likelihood of any and all harm which might be inflicted by a patient. . . ." (Id., at p. 621, 146 Cal.Rptr. 535.)

Similarly, *Bellah* recognized that creating a duty on the part of a psychiatrist to breach the confidence of a doctor-patient relationship by revealing disclosures made about the suicidal intent of his patient would unduly extend the *Tarasoff* holding, and "could well inhibit psychiatric treatment." (*Bellah*, supra, 81 Cal.App.3d at p. 621, 146 Cal.Rptr. 535.) *Bellah* reasoned that in *Tarasoff*, we held only that "where a therapist knows that his patient is likely to injure another and where the identity of the likely victim is known or readily discoverable by the therapist, he must

use reasonable care to prevent his patient from causing the intended injury. Such care includes, at the least, informing the proper authorities and warning the likely victim. However, [*Tarasoff*] did not hold that such disclosure was required where the danger presented was that of self-inflicted harm or suicide. . . . Instead, [*Tarasoff*] recognized the importance of the confidential relationship which ordinarily obtains between a therapist and his patient, holding that 'the therapist's obligations to his patient require that he *not disclose a confidence unless such disclosure is necessary to avert danger to others*. . . . (*Tarasoff*, supra, 17 Cal.3d p. 441, 131 Cal.Rptr. 14, 551 P.2d 334, italics added.)' " (*Bellah*, supra, 81 Cal.App.3d at pp. 620-621, 146 Cal.Rptr. 535.)

Rather than create a duty to prevent suicide, *Bellah* (and *Meier* and *Vistica*) recognized that a cause of action may exist for *professional malpractice* when a psychiatrist's (or hospital's) treatment of a suicidal patient falls below the standard of care for the profession, thus giving rise to a traditional malpractice action.[6] *Bellah* held that courts should not extend *Tarasoff* to require psychiatrists to disclose the confidences of their patient when harm to a third party

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[6] Contrary to Justice Kaufman's suggestion (see conc. opn. by Kaufman, J., at p. 117 of 253 Cal.Rptr., at p. ____ of ____ P.2d); *Bellah*, supra, 81 Cal.App.3d 614, 620, 146 Cal.Rptr. 535, never imposed "an affirmative duty on a psychiatrist to see that his patient does not harm to himself." If such were the case, psychiatrists could be held responsible whenever one of their patients made the unfortunate decision to take his own life. We reject such a broad interpretation of the *Bellah* dictum, and emphasize that because the court affirmed the trial court's order sustaining the psychiatrist's demurrer without leave to amend and dismissed the action, it never decided the duty issue.

is not contemplated. (*Bellah*, supra, 81 Cal.App.3d at pp. 620-621, 146 Cal.Rptr. 535.) Thus, contrary to the Court of Appeal's interpretation of *Bellah*, *Vistica*, and *Meier*, none of these cases supports the finding of a special relationship between Nally and defendants, or the imposition of a duty to refer a suicidal person to a professional therapist as urged in the present case. Indeed, on their limited facts, *Bellah*, *Vistica* and *Meier* weigh against creating such a duty. With the foregoing in mind, we now turn to other considerations articulated in *Rowland v. Christian*, supra, 69 Cal.2d 108, 112-113, 70 Cal.Rptr. 97, 443 P.2d 561, and explain further why we should not impose a duty to prevent suicide on defendants and other nontherapist counselors.

c) The Connection Between Defendants' Conduct and Nally's Suicide and the Foreseeability of Harm

Other factors to consider in determining whether to impose a duty of care on defendants include the closeness of the causal connection between defendants' conduct and the injury suffered, and the foreseeability of the particular harm to the injured party. (*Rowland*, supra, 69 Cal.2d at p. 113, 70 Cal.Rptr. 97, 443 P.2d 561, see *Davidson*, supra, 32 Cal.3d 197, 209, 185 Cal.Rptr. 252, 649 P.2d 894.)

Plaintiffs argue that Nally's statement to Pastors Rea and MacArthur (while he was recovering from his suicide attempt at the hospital), "that he was sorry he wasn't successful and that he would attempt suicide after his release from the hospital," were "hidden dangers" that would have affected his prognosis and treatment. Accordingly, plaintiffs reason the Rea and

MacArthur should have warned the hospital staff and plaintiffs that Nally was still contemplating suicide after his initial attempt. We disagree.

The closeness of connection between defendants conduct and Nally's suicide was tenuous at best.[7] As defendants observe, Nally was examined by five physicians and a psychiatrist during the weeks following his suicide attempt. Defendants correctly assert that they "arranged or encouraged many of these visits and encouraged Nally to continue to cooperate with all doctors." (See *United States Liab. Ins. Co.*, supra, 1 Cal.3d 586, 594, 83 Cal.Rptr. 418, 463 P.2d 770.) In addition, as stated above, following Nally's overdose attempt Dr. Evelyn warned plaintiffs that Nally remained suicidal and that they should encourage him to see a psychiatrist on his release from the hospital. Plaintiffs also rejected both Dr. Hall's and Dr. Parker's suggestion that Nally be institutionalized because, according to plaintiffs, their son was "not crazy."

Nevertheless, we are urged that mere knowledge on the part of the defendants that Nally may have been suicidal at various stages in his life should give rise to a duty to refer. Imposition of a duty to refer Nally necessarily would imply a general duty on all

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[7] Generally, there is a real question about the closeness of the causal connection between a nontherapist counselor's failure to refer to professional help and the suicide of a particular suicidal person. By their very definition, nontherapist counselors are not professional medical experts on suicide. Their activities are undertaken pursuant to doctrines explicitly left unregulated by the state. (See post at pp. 108-09 of 253 Cal.Rptr., at pp. ____ - ____ of ____ P.2d.)

nontherapists to refer all potentially suicidal persons to licensed medical practitioners.

One can argue that it is foreseeable that if a nontherapist counselor fails to refer a potentially suicidal individual to professional, licensed therapeutic care, the individual may commit suicide. While under some circumstances counselors may conclude that referring a client to a psychiatrist is prudent and necessary, our past decisions teach that it is inappropriate to impose a duty to refer — which may stifle all gratuitous or religious counseling — based on foreseeability alone. Mere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm. (See *Davidson*, supra, 32 Cal.3d 197, 209, 185 Cal.Rptr. 252, 649, P.2d 894.)

d) Public Policy Considerations

Imposing a duty on defendants or other nontherapist counselors to, in the Court of Appeal's words, "insure their counselees [are also] under the care of psychotherapists, psychiatric facilities, or others authorized and equipped to forestall imminent suicide," could have a deleterious effect on counseling in general. (See *Bellah*, supra 81 Cal.App.3d at p. 621, 146 Cal.Rptr. 535.) Although both plaintiffs and the present Court of Appeal, in dictum, exempt services such as "teen hotlines" which offer only "band aid counseling," from a newly formulated standard of care that would impose a "duty to refer," the indeterminate nature of liability the Court of Appeal imposes on nontherapist counselors could deter those most in need of help from seeking treatment out of fear that their

private disclosures could subject them to involuntary commitment to psychiatric facilities.

As defendants, amici curiae, and the Court of Appeal dissenter observe, neither the Legislature nor the courts have ever imposed a legal obligation on persons to take affirmative steps to prevent the suicide of one who is not under the care of a physician in a hospital. (See *Katona v. County of Los Angeles* (1985) 172 Cal.App.3d 53, 59, 218 Cal.Rptr. 19; see also *Searcy v. Hemet Unified School Dist.* (1986) 177 Cal.App.3d 792, 804, 223 Cal.Rptr. 206 [school district owes duty to safeguard student on school premises during school hours, but owes no such duty once the student has departed for home].) Indeed, for all practical purposes, a doctor to whom a nontherapist counselor refers a suicidal person may refuse to take the patient. Furthermore, under the Lanterman-Petris-Short Act (Welf. & Inst.Code, §§5200, 5201), "[a]ny individual may" but is not required to institute involuntary commitment proceedings.

We also note that the Legislature has exempted the clergy from the licensing requirements applicable to marriage, family, child and domestic counselors (Bus. & Prof.Code, §4980 et seq.) and from the operation of statutes regulating psychologists (id, §2908 et seq.). In so doing, the Legislature has recognized that access to the clergy for counseling should be free from state imposed counseling standards, and that "the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations." (Ericsson, *Clergyman Malpractice: Ramifications of a New Theory* (1981) 16 Val.U.L.Rev. 163, 176.)

Furthermore, extending liability to voluntary, noncommercial and noncustodial relationships is contrary to the trend in the Legislature to encourage private assistance efforts. This public policy goal is expressed in the acts of the Legislature abrogating the "Good Samaritan" rule. Statutes barring the imposition of ordinary negligence liability on one who aids another now embrace numerous scenarios. (See, e.g., Gov.Code, §50086 [exempting from liability first aid volunteers summoned by authorities to assist in search or rescue operations]; Health & Saf.Code, §§1799.100, 1799.102 [exempting from liability nonprofessional persons giving cardiopulmonary resuscitation].)

On occasion, when the courts have recognized a new duty of care sufficient to impose liability for breach thereof, they have noted that the "wrongs and injuries involved were both comprehensible and assessable within the existing judicial framework." (*Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal.App.3d 814, 824, 131 Cal.Rptr. 854 [refusing to impose liability on school district for graduated plaintiff's inability to read and write]; see also, *Dillon v. Legg* (1968) 68 Cal.2d 728, 742-747, 69 Cal.Rptr. 72, 441 P.2d 912.)

Even assuming that workable standards of care could be established in the present case, an additional difficulty arises in attempting to identify with precision those to whom the duty should apply. Because of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the

religious entity. (See Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers; The First Amendment Considerations* (1986) 89 W.Va.L.Rev. 1, 82-84; Comment, *Religious Torts: Applying the Consent Doctrine as Definitional Balancing* (1986) 19 U.C.Davis L.Rev. 949, 963-964, fn. 69; also, *Lemon v. Kurtzman* (1971) 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745). We have previously refused to impose a duty when to do so would involve complex policy decisions, and we are unpersuaded by plaintiffs that we should depart from this policy in the present case. (See *Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 754-755, 167 Cal.Rptr. 70, 614 P.2d 728; *Bill v. Superior Court* (1982) 137 Cal.App.3d 1002, 1012-1013, 187 Cal.Rptr. 625.)

e) Availability of Insurance

As several commentators observe, although lawsuits stemming from spiritual counseling are few, a new type of "clergyman malpractice" insurance has been offered to religious organizations to protect against potential liability for spiritual counseling that causes injury. (See, e.g., Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?* (1986) 84 Mich.L.Rev. 1296, 1300, fn. 12.) Apparently, such insurance provides coverage to religious congregations and their pastors for damages caused by the counseling activities of the pastors while acting within the scope of their duties. (Ibid.) The value of such insurance, however, is unknown and difficult to determine because few cases have been filed against the clergy.

f) Conclusion

For the foregoing reasons, we conclude that plaintiffs have not met the threshold requirements for imposing on defendants a duty to prevent suicide. (*Rowland*, supra, 69 Cal.2d 108, 113, 70 Cal.Rptr. 97, 443 P.2d 561.) Plaintiffs failed to persuade us that the duty to prevent suicide (heretofore imposed only on psychiatrists and hospitals while caring for a suicidal patient) or the general professional duty of care (heretofore imposed only on psychiatrists when treating a mentally disturbed patient) should be extended to a nontherapist counselor who offers counseling to a potentially suicidal person on secular or spiritual matters.

In the present case, the Court of Appeal erroneously created a broad duty to refer, and to hold defendants potentially accountable for Nally's death based on their counseling activities would place blame unreasonably and contravene existing public policy.[8] Accordingly, we conclude the trial court correctly granted defendants' nonsuit motion as to the "clergyman malpractice" or negligence causes of action.

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[8] Our opinion does not foreclose imposing liability on nontherapist counselors, who hold themselves out as professionals, for injuries related to their counseling activities.

2. Cause of Action for Wrongful Death Based on Intentional Infliction of Emotional Distress

a) Elements of the Tort

[6] The elements of a cause of action for intentional infliction of emotional distress are (i) outrageous conduct by defendants, (ii) an intention by defendant to cause, or reckless disregard of the probability of causing, emotional distress, (iii) severe emotional distress, and (iv) an actual and proximate causal link between the tortious conduct and the emotional distress. (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 155, fn. 7, 233 Cal.Rptr. 308, 729 P.2d 743.) The "[c]onduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson*, supra, 32 Cal.3d at p. 209, 185 Cal.Rptr. 252, 649 P.2d 894, quoting from *Cervantez v. J.C. Penney Co.* (1979) 24 Cal.3d 579, 593, 156 Cal.Rptr. 198, 595 P.2d 975.) As stated in part III hereof, the Court of Appeal limited its discussion of the third cause of action for intentional infliction of emotional distress, to the question of whether the trial court erred in (i) excluding the tape pursuant to Evidence Code section 352, and (ii) granting the nonsuit motion as to the intentional infliction of emotional distress count.

We have found only one California case in which an appellate court affirmed a trial court decision overruling a demurrer and allowing a cause of action for wrongful death based on defendant's outrageous conduct in causing a suicide. In *Tate v. Canonica* (1960) 180 Cal.App.2d 989, 909, 5 Cal.Rptr. 28, the court allowed a widow to state a cause of action for wrongful death based on intentional infliction of emotional

distress after she alleged that defendant intentionally made threats and accusations against her husband and such conduct was a *substantial factor* in bringing about the husband's suicide. The *Tate* court rejected as inapplicable to intentional torts, the defenses of supervening cause and contributory negligence. (Id., at p. 908, 5 Cal.Rptr. 28.) Thus, under *Tate*, a plaintiff may resist a demurrer to a wrongful death action for intentional conduct leading to suicide if he can allege facts sufficient to show that defendant's conduct was outrageous *and* a substantial factor in the decedent's suicide. (*Tate*, supra, 180 Cal.App.2d 898, 909, 5 Cal.Rptr. 28.) With the foregoing in mind, we now turn to the present case in order to determine whether the trial court properly excluded the tape of Pastor Thomson's 1980 lecture under Evidence Code section 352, or whether the evidence was relevant to proving plaintiffs' third cause of action consistently with the *Tate* and *Davidson*, supra, 32 Cal.3d 197, 185 Cal.Rptr. 252, 659 P.2d 894, standards.

b) Procedural Background

The Court of Appeal did not discuss defendants' First Amendment defenses to the admissibility of the tape recording, because it believed it was bound, under the law of the case doctrine (discussed below), by the holding in *Nally I* that the First Amendment did not immunize defendants from liability. The court, however, did not believe it was prevented from examining the "sufficiency of the evidence introduced at trial to support the third count."

The court found, as did the Court of Appeal in *Nally I*, that the tape recording was essential to establishing plaintiffs' cause of action for wrongful death based on

intentional infliction of emotional distress, and that is exclusion was therefore erroneous. The court stated that in "[c]onstruing the evidence [including the tape recording] most favorably to [plaintiffs] we conclude a reasonable juror could have found the counselors acted recklessly in a way which encouraged this suicide."

Plaintiffs, on the other hand, do not address the merits of the trial court's exclusion of the tape but instead argue that 'he trial and appellate courts are bound by the law-of-the-case doctrine insofar as it precludes reconsideration of defendants' asserted constitutional defenses and the objections concerning the viability of plaintiffs' third cause of action for intentional infliction of emotional distress. Plaintiffs assert that we are bound by the appellate court ruling in *Nally I* that the facts of this case satisfy the requirements of the substantive tort of intentional infliction of emotional distress.

c) Law-of-the-Case Doctrine

[7] Under this doctrine, "the decision of an appellate court stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case." (9 Witkin, Cal.Procedure (3d ed. 1985) Appeal, §737, pp. 705-707.) The rule is not invoked where the sufficiency of the evidence necessary to sustain the judgment depends on the probative value or effect of the evidence itself, and the evidence in the second trial is changed. (9 Witkin, supra, §750, at p. 718.) Similarly, the doctrine does not apply to points of law that might have been, but were not determined on the prior appeal.

(9 Witkin, supra, §752 at pp. 719-720; *Tally v. Ganahl* (1907) 151 Cal. 418, 421, 90 P. 1049.)

[8] Recently, an additional reason for declining to apply the doctrine was announced in *Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 212 Cal.Rptr. 466, 696 P.2d 1308, in which we held: "The primary purpose served by the law-of-the-case rule is one of judicial economy. Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding. . . . That reason for the rule is inoperative when the court hearing the subsequent appeal determines that there should be a reversal on a ground that was not considered on the prior appeal. The fact that reversal is necessary in any event frees us from the compulsion that the rule of law of the case might otherwise impose on us to follow a ruling in the prior appeal that we do now perceive to be manifestly erroneous." (38 Cal.3d at p. 435, 212 Cal.Rptr. 466, 696 P.2d 1308)

We perceive no obstacle under the law-of-the-case doctrine to reviewing the evidentiary question regarding the tape recording's admissibility. Contrary to plaintiffs' assertion that we are bound by a theoretical imposition of liability on defendants based on the findings in *Nally I*, the Court of Appeal there found only that plaintiffs had raised a triable issue of fact sufficient to defeat a summary judgment motion, and therefore did not determine liability as plaintiffs seem to imply.

As we explain below, however, we disagree with the Court of Appeal's conclusion that the trial court improperly excluded the evidence under Evidence

Code section 352. Accordingly, it is unnecessary to reach the broader constitutional issues raised by the parties, or the validity of the Court of Appeal's holding that the constitutional defense was barred by the law-of-the-case doctrine.

d) Analysis of the Evidentiary Ruling

In 1981, 18 months after Nally's suicide, Pastor Thomson taught a series of classes of biblical counseling. The class sessions included question and answer periods that were tape recorded. During one session, a student questioned Thompson on whether a person who committed suicide could be "saved." Thompson replied, in a manner consistent with Reformation Protestant theology views regarding sin, grace and faith, that a person neither acquires salvation by his own works nor forfeits salvation by the commission of subsequent sins. Plaintiffs sought to introduce the tape recording at trial on the basis that it provided inferential proof of Thomson's advice to Nally during the three counseling sessions in 1979.

The court held extensive hearings outside the presence of the jury on the admissibility of the recording to determine whether its content was relevant. During the in camera sessions, the court pointed out that even if the recording were admitted, there was no evidence Thomson spoke similar words to Nally during their counseling sessions or that such words could have contributed in any way to, or proximately caused, Nally's death. The court also observed that the best way to establish what Thomson told Nally was through direct examination. Eventually, the court ruled it would not admit the recording, "on the basis that its relevancy is such that it would

necessitate the undue consumption of time, would create substantial danger of undue influence to the jury and could confuse the issues and be misleading to the jury." (See Evid.Code, §352.)

In determining whether the trial court properly exercised discretion in excluding the tape, we consider the relationship between the evidence and the relevant inferences to be drawn from it. (See *Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291, 143 Cal.Rptr. 496.) The Court of Appeal stated that the tape recording was relevant to prove Pastor Thomson's "own personal state of mind on the question of suicide and suicide counseling and how other counselors were trained on these issues." The court asserted that "the statements on the tape [were] relevant to prove the probable content of the counseling the defendants offered [to] the plaintiffs' suicidal son. The tape recordings tend to establish the customary approach the Church's counselors used when counseling suicidal individuals." These conclusions appear to misstate the relevant evidence.

[9] First, as the trial court found, the tape does not tend to prove that defendants in any way encouraged Nally to commit suicide or acted recklessly in disregard of Nally's emotional state prior to his suicide. (See *People v. Jones* (1954) 42 Cal.2d 219, 222, 266 P.2d 38.) Although there is some indication in the record that Nally may have attended some of defendants' bible classes between 1974 and 1979, there is no evidence that Thomson was ever asked about salvation and suicide during a lecture prior to 1980 or that he would have given a similar response at that time if he had been so asked. Moreover, as Thomson himself testified, his responses to questions in the classroom

setting would by their very nature differ from the way he handled an individual counseling session because he would have considered the emotional state of the individual and his particular counseling needs during the counseling session.

In addition, the evidence was simply too temporally remote to establish any causal connection with Nally's suicide. As Justice Cole's dissent in the Court of Appeal observes, "what was said in an extemporaneous answer, which did not precisely reflect the thoughts of Pastor Thomson, given almost two years after the incident at issue is at best marginally relevant to prove what was said at the time in question. The trial judge made a carefully considered decision after considerable deliberation. Clearly, there was a basis for the trial court's ruling that admission of the tape created substantial danger of misleading the jury and prejudicing the defendants." Based on the foregoing, we disagree with the Court of Appeal's conclusion that the response given by Pastor Thomson to an inquiry by a seminary student almost two years after Nally's suicide could assist in establishing what Pastor Thomson told Nally during the individual counseling sessions.

Finally, "California trial judges have considerable discretion under Evidence Code section 352 to exclude evidence if its probative value is substantially outweighed by its prejudicial effect." (*Michail v. Fluor Mining & Metals, Inc.* (1986) 180 Cal.App.3d 284, 286, 226 Cal.Rptr. 403.) Because the record shows that the trial court carefully and properly weighed the prejudicial effect of the evidence against its probative value, the Court of Appeal erred in finding that a

substantial abuse of discretion occurred in excluding the evidence.

V. CONCLUSION

We conclude the trial court correctly granted a nonsuit on all causes of action. The suicide of a young man in the prime of his life is a profound tragedy. After considering plaintiffs' arguments and evidence, however, we hold that defendants had no duty to Nally on which to base liability for his unfortunate death.

The judgment of the Court of Appeal is reversed and the Court of Appeal is directed to enter judgment affirming the judgment of nonsuit and dismissing the action.

MOSK, PANELLI, ARGUELLES and EAGLESON, JJ., concur.

KAUFMAN, Justice concurring.

I concur in the judgment that nonsuit was properly granted, but disagree with the majority's holding that defendants owed no duty of care to the plaintiffs.

The majority appears to reject the proposition that defendants in this matter, or "nontherapist counselors in general," have a duty to advise potentially suicidal counselees to seek competent medical care. (Maj. opn. at p. 105 of 253 Cal.Rptr., at p. ___ of ___ P.2d.) Yet the majority does not purport to "foreclose imposing liability on nontherapist counselors, who hold themselves out as professionals, for injuries related to their counseling activities." (Maj. opn. at p. 110, fn. 8 of 253 Cal.Rptr., at p. ___, fn. 8 of ___ P.2d.)

In view of the majority's suggestion that a nontherapist counselor who holds himself out as

competent to treat a suicidal person owes a duty of care to that person, I am baffled as to the basis or the *necessity* of the majority's broad conclusion that "nontherapist counselors in general"do *not* owe such a duty. The evidence in the record, viewed — as the law requires — in *plaintiffs'* favor, demonstrates that defendants (1) expressly held themselves out as fully competent to deal with the most severe psychological disorders, including major depression with suicidal symptoms, (2) developed a close counseling relationship with Kenneth Nally for that very purpose, and (3) realizing that Nally's suicide was at least a possibility. Thus, the evidence was more than sufficient, in my view, to trigger a minimal duty of care to Nally. What was fatally *absent* from plaintiffs' case was not evidence of duty, but proof that defendants breached that duty, and that such breach constituted a proximate cause of Nally's suicide. Therefore, while I concur in the decision to reverse the judgment of the Court of Appeal and to reinstate the judgment of nonsuit and dismissal of the action, I strongly disagree with the conclusion that defendants owed no duty of care in this matter.

APPENDIX F

APPENDIX F

Walter J. NALLY and Maria Nally, Plaintiffs and Appellants,

v.

GRACE COMMUNITY CHURCH OF THE VALLEY, a Non-Profit Corporation; John F. MacArthur, L. Duane Rea, Richard A. Thomson, Jr., and Lynn Cory, Defendants and Respondents.

B015721.

Court of Appeal, Second District, Division 7.

Sept. 16, 1987.

As Modified on Denial of Rehearing Oct. 16, 1987.

Review Granted Jan. 21, 1988.

Parents whose son committed suicide brought action against church and church-related counselors alleging negligent counseling and outrageous conduct. On remand from the Court of Appeal, the Los Angeles County Superior Court, Joseph Kalin, J., entered nonsuit. Appeal was taken. The Court of Appeal, Johnson, J., held that: (1) prior Court of Appeal decision that First Amendment did not create immunity shielding church-affiliated counselors from liability for intentional and outrageous conduct in counseling suicidal youth was law of the case; (2) nonsuit was not warranted as to cause of action for negligently discouraging suicidal youth from seeking psychiatric care; (3) nontherapist counselor who has held himself out as competent to treat serious

emotional problems and voluntarily established counseling relationship with emotionally disturbed person has duty to take appropriate precautions should that person exhibit suicidal tendencies; and (4) nonsuit was not warranted as to cause of action for intentional or reckless infliction of emotional injury allegedly leading to suicide.

Reversed and remanded.

Cole, J., assigned, filed a dissenting opinion.

1. Appeal and Error §76(1)

A determination, though characterized as an "order," may be in effect a final judgment for purposes of appeal.

2. Appeal and Error §133

An order for entry of judgment of nonsuit was sufficient to constitute a judgment; therefore, it was a final appealable judgment.

3. Trial §139.1(16)

Trial court may not grant defendant's motion for nonsuit if plaintiff's evidence would support jury verdict in plaintiff's favor.

4. Appeal and Error §927(3)

In appeal from judgment of nonsuit, reviewing court is guided by rule requiring evaluation of evidence in light most favorable to plaintiff.

5. Appeal and Error §856(4)

Only grounds specified by moving party in support of motion for nonsuit may be considered by appellate court in reviewing judgment of nonsuit.

6. Appeal and Error §1097(1)

Law of the case doctrine applies even though court on later appeal is of view that prior decision was erroneous.

7. Appeal and Error §1097(1)

Law of the case doctrine does not apply to points of law which might have been but were not determined on prior appeal, particularly where court in prior opinion expressly declined to pass on point.

8. Appeal and Error §1097(1)

Prior opinion does not constitute law of the case where evidence at second trial is substantially different from that considered in prior opinion.

9. Appeal and Error §1097(1)

Prior Court of Appeal decision that First Amendment did not create immunity shielding church-affiliated counselors from liability for intentionally or recklessly encouraging suicidal individual to take his life was law of the case since Court of Appeal gave consideration to applicability of First Amendment to that portion of prior complaint alleging outrageous conduct U.S. C.A. Const.Amend. 1.

10. Appeal and Error §1097(1)

Law of the case did not bar Court of Appeal on subsequent appeal from considering sufficiency of evidence to support count against church and church-affiliated counselors for allegedly outrageous conduct in counseling suicidal youth; prior Court of Appeal decision merely held that First Amendment did not create immunity shielding church-affiliated counselors from liability for intentional or reckless infliction of

emotional distress on suicidal youth which led to his death. U.S.C.A. Const. Amend.1.

11. Appeal and Error §1097(1)

Law of the case did not prevent Court of Appeal, in subsequent appeal, from considering counts against church and church-affiliated counselors for alleged negligent counseling of suicidal youth; in prior opinion, Court of Appeal explicitly stated it did not have to decide whether church had duty to adequately train counselors as psychological counselors or whether psychological counselor had duty to refer suicidal youth to mental health professional.

12. Physicians and Surgeons §15(23)

Someone who chooses to counsel a person exhibiting suicidal tendencies may assume a duty which does not attach to counseling of persons with lesser mental or emotional problems, that is the duty to take appropriate measures to minimize likelihood suicide will take place.

13. Negligence §136(14)

It is a question of law whether one person has duty of due care toward another, as is more specific question of whether he has assumed such a duty by establishing a special relationship with that person.

14. Negligence §8

Bystander watching someone about to leap off cliff has no duty to attempt to prevent that suicide and no duty to suggest suicidal individual see psychotherapist or enter psychiatric hospital even when it is reasonably foreseeable the individual will kill himself.

15. Negligence §8
Physicians and Surgeons §15(23)

Nontherapist counselor, who has held himself out as competent to treat serious emotional problems and voluntarily established counseling relationship with emotionally disturbed person, has duty to take appropriate precautions should that person exhibit suicidal tendencies; however, that duty does not extend to personal friends who emotionally disturbed people may consult.

16. Religious Societies §30

Parents, whose son committed suicide, stated cause of action against church and church-affiliated counselors for alleged negligent counseling which led to suicide, there was ample evidence that church-affiliated counselors were more than personal friends giving youth some incidental advice about his emotional problems as an act of friendship,there was evidence demonstrating that counselors were offering and giving something far beyond short-term "band-aid" counseling or casual advice, and church was advertising its counselors were competent to treat a full spectrum of serious, as well as less serious, emotional problems.

17. Physicians and Surgeons §15(23)

Nontherapist counselors have no duty to take appropriate precautions against suicide unless suicide is foreseeable to them and they would thus not violate their standard of care where counselee's behavior would lead therapist to foresee suicide but would not lead nontherapist counselor to that same conclusion.

18. Physicians and Surgeons §15(23)

Minimal standard of care nontherapist owes counselee he diagnoses as suicidal is to take steps to place him in hands of those to whom society has given authority and who by education and experience are in best position to prevent suicidal individual from succeeding in killing himself.

19. Physicians and Surgeons §15(23)

In many instances, standard of care expected of counselors treating suicidal counselees can be satisfied merely by telling counselee he should seek psychotherapist or go to psychiatric facility about his suicidal feelings; but where it becomes apparent that counselee is resistant, jury can reasonably find counselor should have taken further steps, which on occasion would include informing those in a position to prevent counselee's suicide about factors suggesting counselee harbors imminent plans to kill himself.

20. Religious Societies §31(6)

Evidence that church and church-affiliated counselors breached their duty as nontherapist counselors to suicidal youth was sufficient to overcome nonsuit motion in action brought by parents; youth's suicide was foreseeable to counselors and counselors failed to satisfy nontherapist counselor's minimal standard of due care in that they neglected to refer youth to psychiatrist or psychiatric hospital or other mental health professional society authorized and equipped to minimize risk youth would commit suicide, and church breached duty to train counselors in their responsibilities to refer suicidal counselees or otherwise insure they were aware of those responsibilities.

21. Constitutional Law §84(1)

Freedom of belief is absolutely guaranteed under free exercise clause but freedom of action is not. U.S.C.A. Const. Amend.1.

22. Constitutional Law §84(1)

For government to be able to burden expression of religious belief which adversely affects significant societal interest, government must be seeking to further an important state interest, burden on expression must be essential to further that state interest, type and level of burden imposed must be minimum required to achieve state interest, measure imposing burden must apply to everyone, not merely to those who have religious belief, and it may not discriminate against religion. U.S.C.A. Const. Amend.1.

23 Constitutional Law §84.5(1)

Fact that someone has personal preference, not grounded in religion, to disobey law in no way invokes sacred protections of freedom of religion guarantees of Constitution. U.S.C.A. Const. Amend.1.

24. Constitutional Law §84.5(7)

It was reasonable from record to conclude that church-affiliated counselors held no religious beliefs inconsistent with referring suicidal youth to those individuals or institutions authorized and equipped to prevent suicide; accordingly, nonsuit should not have been granted, on free exercise grounds, of action brought by parents alleging negligent counseling. U.S.C.A. Const. Amend.1.

25. Constitutional Law §84.5(7)

First Amendment would not be offended even if duty were imposed on church-affiliated counselors to refer suicidal individual to those authorized and equipped to prevent suicide, even if duty were imposed on religious counselor who had religious belief suicidal individual should not be referred to or treated by mental health professional; there is compelling state interest in preventing suicide, it promotes compelling state interest to impose on all counselors, religious and secular alike, standard of care which could require them to make references, imposition of responsibility is narrowly tailored to achieve compelling state interest in suicide prevention at least possible cost to religious freedom, and duty is not discriminatory against religion in general. U.S.C.A. Const. Amend.1.

26. Evidence §268,359(5)

In action brought by parents, whose son committed suicide, against church and church-affiliated counselors alleging outrageous conduct in connection with counseling, recording of one counselor from which reasonable inference could have been drawn that church and each counselor followed a policy of counseling suicidal persons that, if one was unable to overcome one's sin, suicide was acceptable and even desirable alternative was admissible; tape was relevant as evidence of counselor's state of mind while counseling suicidal youth and relevant to prove probable content of counseling offered suicidal youth.

27. Damages §208(6)

Nonsuit was not warranted as to parents' cause of action against church and church-affiliated counselors for intentional or reckless infliction of emotional injury

allegedly leading to their son's suicide given recording made by one counselor from which reasonable inference could have been drawn that church and counselors followed policy of counseling suicidal persons that, if one was unable to overcome one's sins, suicide was acceptable and even desirable alternative to living.

Edward Barker, Los Angeles, for plaintiffs and appellants.

Cooksey, Coleman & Howard and David R. Cooksey, Santa Ana, Samuel E. Ericsson and Michael A. Paulsen, for defendants and respondents.

JOHNSON, Associate Justice

This is the second time around in the appellate courts for this case. The first opinion generated a veritable firestorm of controversy in the nation's law reviews. (See, e.g.,the authorities collected in fn. 3, p.224, infra.) They called it the seminal case in a new cause of action most recently labeled "clergy malpractice." This court, however, does not view the causes of action discussed in our opinion to involve "clergy malpractice." Instead we see them more accurately characterized as "negligent failure to prevent suicide" and "intentional or reckless infliction of emotional injury causing suicide"-which negligence and intentional or reckless acts happen to have been committed by church-affiliated counselors. In our view this case has little or nothing to say about the liability of clergymen for the negligent performance of their ordinary ministerial duties or even their counseling

duties except when they enter into a counseling relationship with suicidal individuals.

In this case we reverse the trial court's nonsuit of the negligence and outrageous conduct allegations against Grace Community Church (Church) and several of its pastoral counselors. We construe the negligence allegations to charge inter alia that the Church's counselors negligently failed to refer this mentally disturbed suicidal youth to those authorized and best suited to prevent an imminent suicide. We find established principles of California law impose a duty of due care on those who undertake a counseling relationship with mentally disturbed individuals, whether those counselors are affiliated with a religious institution or not. For those counselors not authorized to prescribe medication or initiate involuntary hospitalization the standard of care may require them, in appropriate cases, to refer counselees to those who possess these powers to prevent an imminent suicide. A reasonable juror could have found from the available evidence that the counselors in the instant case failed to satisfy this standard of care. We then hold the First Amendment does not immunize the Church's counselors from liability for failing to meet this standard of care. Accordingly, the trial court erred in granting nonsuit as to the allegations of negligent failure to refer a suicidal individual to those authorized and suited to prevent an imminent suicide.

At an earlier stage of these proceedings another Court of Appeal construed the "outrageous conduct" count to state a cause of action for intentional or reckless infliction of emotional distress on the suicidal youth which led to his death. We defer to this prior appellate opinion under the law of the case doctrine.

We then hold the trial court erred in excluding audio tapes the Nally 1 court had found to raise a triable issue whether the counselors indeed had intentionally or recklessly encouraged this suicidal youth to commit suicide. Including this audio tape in the assessment and construing the evidence most favorably to appellants we conclude a reasonable juror could have found the counselors acted recklessly in a way which encouraged this suicide. The Nally 1 court already held the First Amendment does not create immunity shielding these church-affiliated counselors from liability for intentionally or recklessly encouraging a suicidal individual to take his life. Accordingly, we reverse the trial court's nonsuit of this count, too.

FACTS AND PROCEEDINGS BELOW

This case arises out of a profound human tragedy-the suicide of a healthy, intelligent young man with a promising future. Kenneth Nally graduated second in his class from high school and was a star baseball player. He finished college and was contemplating law school. But while still in his late teens Kenneth had developed a mental illness. This illness worsened and eventually led this young man to kill himself with a shotgun at the age of 24.

This case also involves a large, well-established church. As many as 10,000 people attend Grace Community Church on a given Sunday. In addition to religious services, the Church also conducts a very active counseling program, having had close to 30 counselors in 1979. Kenneth Nally first came to the Church about 1974. He became a friend of defendant Cory who was a pastor in the college department of the Church in 1976, 1977 and 1978. Defendant Cory

testified he had no formal counseling sessions with Kenneth but knew the boy was depressed. He recommended to Kenneth he take counseling from defendants Thomson and Rea. According to Cory's testimony, he did not recommend Kenneth see a psychiatrist or psychologist although nothing in Mr. Cory's religious belief or the theology of Grace Community Church would say it is wrong to do so. When Kenneth was hospitalized (three weeks or so before his death) from a suicide attempt, Mr. Cory visited him and overheard him tell defendant MacArthur he (Kenneth) was sorry he had not been successful in the suicide attempt. He did not convey this information to any doctors or to Kenneth's family.

Duane Rea was employed at Grace Community Church as a counselor. In this capacity he counseled people with severe emotional problems, including people who were very depressed and who expressed suicidal thoughts. The counseling is essentially biblical, the witness holding the belief the Bible holds answers to emotional problems. He counseled Kenneth from January 1978 to April 1978. Kenneth was distraught and cried from time to time. He said he could not cope. Mr. Rea has not had any graduate or undergraduate training in psychology and holds no license in any of the mental health professions. He considers himself gifted at counseling, qualifying this statement by saying only God can know.

Mr. Rea also testified that while Kenneth was in the hospital following his suicide attempt, he told the youth it was his legal duty to see the hospital psychologist before he could be discharged. Aside from this occasion, Mr. Rea never recommended Kenneth see a psychologist or psychiatrist. Nor did he recommend to

Kenneth he consult with anyone else, with two exceptions. At one time Rea asked Kenneth to consult with Mrs. Rea about his girlfriend. He also counseled Kenneth he should get help from God. When Mr. Rea visited Kenneth at the hospital, Kenneth stated if he had an opportunity when he was released he would try suicide again. Mr. Rea did not tell this to the Nally family, nor the doctors. He stated to do so would be like going to a fire, seeing firemen there and calling the fire department. (Other evidence at the trial indicated Kenneth never expressed similar sentiments about his intent to commit suicide to his parents or to any of the doctors or anyone else.)

Kenneth was also in a counseling relationship with defendant Thomson. Mr. Thomson was a pastor at the Church. He had one course in psychology in college. He studied biblical or pastoral counseling at a seminary. He considers Bible study gave him a very good background to help people with their problems. He has read books on secular psychology as opposed to Christian psychology. The Church would try to help anyone with emotional problems if they came in. He believes the Bible gives the root answer to why emotional or psychiatric problems exist. If there are physical manifestations such as a brain tumor, then it is important to have a medical doctor involved. It is his conviction that to settle for an answer from secular psychiatry or psychology is to settle for less than God's goal. Thomson counseled people with severe problems and those with suicidal ideation. He talked with Kenneth about suicide. He thought a biblical counselor could help Kenneth and did everything he could to give biblical help. He met with Kenneth three times in all, beginning a month before the suicide attempt which put Kenneth in the hospital. He did not tell Kenneth's

father that Kenneth contemplated suicide. His second and third sessions with Kenneth were after the hospitalization.

According to his testimony, Defendant Thomson sees nothing wrong with having a medical doctor prescribe medication for depression, but would not refer someone to a psychiatrist, generally, unless he believed the psychiatrist had a "world view" or was "coming from a viewpoint consistent with the scripture." Because Mr. Thomson has reservations about recommending psychiatrists or psychologists, he made a recommendation that Kenneth should see a medical doctor. According to his testimony, the third time the witness met Kenneth, the latter asked about seeing a Dr. Mohline. The witness said he strongly recommended Kenneth do so, understanding Dr. Mohline to be a Christian psychologist.

Defendant MacArthur was the pastor-teacher of Grace Community Church. It is his name on the marquee in front of the Church building. He never had a counseling relationship with Kenneth prior to visiting him at the hospital after Kenneth's suicide attempt. At the hospital Kenneth said he was sorry he had not succeeded in taking his life. After hospitalization Kenneth stayed in Mr. MacArthur's home for some days. Mr. MacArthur was of the view that Kenneth was deeply depressed and his depression was beyond Mr. MacArthur's capabilities to deal with. According to Pastor MacArthur's testimony, he encouraged Kenneth to see the doctors he had seen in the hospital. Pastor MacArthur also testified nothing in the Church's religion makes it theologically improper for Kenneth to have seen a psychologist or psychiatrist. The witness stressed to Kenneth he should fulfill his

obligation and see the doctors at the hospital whom the witness thought were psychiatrists or psychologists. Pastor MacArthur further testified it was not his belief or that of Grace Community Church the "right" psychiatrist had to be a Christian. The record is inconclusive as to whether Mr. MacArthur communicated with the Nally parents either directly or indirectly.

Before granting the motion for judgment of nonsuit the trial court admitted testimony (over objection of respondents) from four witnesses as to the standard of care to be followed by pastoral counselors. One witness, Dr. Mohline, not himself a psychologist, was dean of administration of a "school of psychology" and further taught a class in biblical or pastoral counseling at a seminary. It was his view a pastoral counselor has a responsibility to refer someone with a severe mental problem to a person trained in psychiatry or psychology.

A second witness, Dr. Long, was a board certified psychiatrist and also held a theological degree, having been an ordained Methodist minister. He testified persons who counsel suicidal people have a duty to investigate "suicidality," to refer to other specialists and to convey any information received to the family or to another specialist. It was his view Pastor Rea failed in a duty to investigate the seriousness of Kenneth's suicidal intentions and to refer Kenneth to a psychiatrist once he left the hospital. The witness opined Mr. Rea did not meet those duties.

A third witness was Dr. Majovski, a licensed psychologist with a divinity degree from a Baptist seminary. He agreed with Dr. Long as to the existence of these duties. He did not know if defendant

MacArthur adequately investigated Kenneth's "'suicidality," or whether he adequately referred Kenneth to a psychiatrist. And, as to a duty to convey the information to the family or emergency doctors, the duty existed "if you're subscribing to standards." Otherwise it is a matter of choice.

The fourth expert witness, Dr. Adams, was also a licensed psychologist and a minister. He was not familiar with any formal standards of care for pastoral counselors in dealing with suicidal people. He also agreed, however, there was a duty in dealing with a suicidal person to investigate and if the person was seriously suicidal to refer to psychologists or psychiatrists and to transmit helpful information to the doctors or the family. It was his opinion defendant Thomson violated the standards. The witness was presented with an exhibit which was a guide for biblical counselors at defendant Church. The exhibit indicated, in the witness' view, that Grace Community Church has no standards.

Walter J. and Maria Nally sued Grace Community Church, and Pastors MacArthur, Rea, Thomson and Cory for the wrongful death of their son. Plaintiffs' complaint was in three counts. In the first two of the counts plaintiffs claimed defendants negligently counseled their son, Kenneth, who ultimately committed suicide (at the age of 24) on April 2, 1979. These counts are labeled respectively "clergyman malpractice" and "negligence." The third count, dubbed as "outrageous conduct, "incorporates the first two and claims the alleged negligence was recklessly perpetrated with the knowledge the acts done would increase Kenneth's tendencies to take his own life.

[1,2] After summary judgment in favor of defendants was reversed by the Court of Appeal, the case went to trial. Following a three-week trial,the court granted a nonsuit motion. Plaintiffs appeal from this judgment.[1]

DISCUSSION

I. STANDARD OF REVIEW

[3-5] A trial court may not grant a defendant's motion for nonsuit if the plaintiff's evidence would support a jury verdict in the plaintiff's favor. *(Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 129,211 Cal.Rptr. 356, 695 P.2d 653.) "In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to

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[1] The notice of appeal states that plaintiffs appeal "from the judgment entered May 24, 1985," The record on appeal contains no document labeled "judgment." I does contain a document entitled "Order for Judgment of Non-Suit"signed by the court and filed on May 24, 1985. The order refers to defendants' motion for nonsuit and states, "IT IS ORDERED, ADJUDGED, and DECREED, that. . .the Plaintiffs take nothing by the Complaint herein on file, that this Order shall operate as an adjudication on the merits, and that Defendants recover from Plaintiffs their costs. . ."

A determination, though characterized as an "order" may be in effect a final judgment for the purpose of appeal. (7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 3, p. 454.) "There is no prescribed form for a judgment. Its sufficiency depends upon whether it shows distinctly that the issues have been adjudicated." (7 Witkins, Cal. Procedure, *supra*, Judgment,§ 30, p. 472.) The order for entry of judgment here involved is thus sufficient and, accordingly, we treat it as the final appealable judgment.

plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give 'to the plaintiff['s] evidence all the value to which it is legally entitled, . . .' [Citation.]". *(Campbell v. General Motors Corp.*(1982 32 Cal.3d 112, 118, 184 Cal.Rptr. 891, 649 P.2d 224). In an appeal from a judgment of nonsuit the reviewing court likewise is guided by the rule requiring evaluation of the evidence in the light most favorable to plaintiff. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839, 206 Cal.Rptr. 136, 686 P.2d 656.) Only the ground specified by the moving party in support of his motion may be considered by the appellate court in reviewing a judgement of nonsuit. (*Ibid.*)

II. LAW OF THE CASE

We do not write upon an entirely clean slate. In 1981 the defendants moved for summary judgment. The trial court granted the motions but another division this court by a 2-1 vote, reversed.[2]

[6-8] The law of the case doctrine deals with the effect of a prior appellate decision on a subsequent retrial or appeal. "The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any

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[2] We take judicial notice of the prior appeal file and the opinion therein rendered (*Nally v. Grace Community Church*, 2 Civ. No. 67200.) Although the Supreme Court ordered that the opinion not be published in the Official Reports, thereby precluding its citation for precedential purposes (Cal.Rules of Court, rule 977), it still must be considered for application of the law of the case doctrine. (*Ibid.*)

subsequent retrial or appeal in the same case." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 737 p. 705.) The rule applies even though the court on the later appeal is of the new that the prior decision was erroneous. (*Tally v. Ganahl* (1907) 151 Cal. 418, 421, 90 P. 1049.) The doctrine does not apply to points of law which might have been, but were not determined on the prior appeal (*Allen V. Cal. Mutual B. & L. Assn.* (1943)22 Cal.2d 474, 493, 139 P.2d 321), particularly where the court in the prior opinion expressly declined to pass on the point. (*Estate of Baird (1924) 193 Cal. 225, 239, 223d P. 974; 9 Witkin, Cal. Procedure, supra,* Appeal, § 753, p. 721.) Nor does the prior opinion constitute law of the case where the evidence at the second trail is substantially different from that considered in the prior opinion. (9 Witkin, Cal. Procedure, *supra,* Appeal, § 750, p. 718.) With these principles in mind we look to see what the first opinion decided, in contrast to the evidence which was introduced at the trial here under review.

In reviewing the previous grant of summary judgment, the appellate court had before it the various declarations and deposition extracts relied upon by the parties. These established the general course of the counseling and other contacts which Kenneth had had with the defendants over the two years or so prior to his suicide. To this extent, the testimony of those deponents or declarants who also were witnesses at the trial was generally the same.

But, there was an important difference: the prior appellate decision relied heavily upon evidence submitted by plaintiffs in opposition to the summary judgment but which was excluded at the trial. We discuss the propriety of the evidentiary ruling later in

this opinion. For present purposes we note the appellate court in the prior decision was of the view of the evidence at issue (certain tapes prepared by defendant Thomson a year after the death of Kenneth, and intended to be used in connection with pastoral training of counselors) could support an inference the defendants "either followed a policy of counseling suicidal persons that, if one was unable to overcome one's sins, suicide was an acceptable and even a desirable alternative to living or recklessly caused such persons extreme emotional distress through their counseling methods if those persons did not measure up to the pastors' religious ideals." (Prior opn., p. 8.) The court then concluded from the evidence presented "a trier of fact might well find that defendants engaged in extreme or outrageous conduct by deliberately encouraging Kenneth Nally to commit suicide or by either deliberately or recklessly increasing his intense feelings of guilt with full knowledge of his past attempts at suicide." (Prior opn., p.11.) The court then held the defendants had failed to establish there was no triable issue of fact with respect to the "outrageous conduct" cause of action.

Having reached the above conclusion the prior opinion then turned to an examination of the First Amendment's "free exercise" clause with respect to a cause of action against a church and its clergy for intentional infliction of emotional distress. Citing the oft-quoted phrase from *Cantwell v. Connecticut* (1939) 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213, that the free exercise clause "embraces two concepts,--freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be, " the court held counseling falls within the latter category.

[9,10] Since the court gave consideration to the applicability of the First Amendment to the third count of the complaint and concluded it would not prevent liability for intentional conduct, we are bound by that opinion. But, it is clear no such inhibitions prevent examination of the sufficiency of the evidence introduced at trial to support the third count. It was because of such insufficiency the trial court granted nonsuit as to this count. The law of the case does not bar us in this respect.

[11] Nor are we barred in looking at the two negligence counts from a fresh view point. While plaintiffs argue the First Amendment ruling of the prior opinion must necessarily relate also to these two counts and therefore establish the law of the case, we reject the argument. Even authority cited in the prior opinion for the proposition a cause of action may be stated against a religious organization for intentional infliction of emotional distress distinguishes this from allegations the organization acted negligently toward a plaintiff. Of more importance, in its prior opinion the court explicitly stated it need not decide whether the Church had a duty to adequately train pastors as psychological counselors not whether Mr. MacArthur had a duty to refer Kenneth to a mental health professional. We thus are not bound by the law of the case with respect to the negligence counts.

III. NONSUIT WAS NOT WARRANTED AS TO THE CAUSE OF ACTION FOR NEGLIGENTLY DISCOURAGING A SUICIDAL PERSON FROM SEEKING PSYCHIATRIC CARE SH4

A. *The Jury Could Reasonably Conclude the Standard of Care Imposed on Non-Therapists Who Hold Themselves Out as Counselors Can Require Them to Refer Mentally Disturbed Suicidal Persons to Those Individuals or Institutions Authorized and Specially Suited to Prevent Suicide.*

Several law review commentators have written on this topic, especially as it relates to counselors affiliated with a religious institution. These commentators have taken a variety of positions.[3] At this stage

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[d3] See, e.g., the following books and articles, most of which touch upon the issue of whether a cause of action can be stated as well as the constitutional issue. Malony, Needham & Southard, Clergy Malpractice (1986); Augspurger, *Legal Concerns of the Pastoral Counselor* (1980) 29 Pastoral Psychology 109; Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice* (1981) 9 San Ferenando Val.L.Rev. 47; Berstein, *A Potential Peril of Pastoral Care: Malpractice* (1980) 19 J. Religion & Health 48; Breecher, *Ministerial Malpractice: Is It A Reasonable Fear?* (July 1980) 16 Trial 11; Ericsson, *Clergyman Malpractice: Ramifications of a New Theory* (1981) 16 Val.U.L.Rev. 163; McMenamin, *Clergy Malpractice*, (Sept.-Oct. 1985) 90 Caw & Comm. 3; Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise?"* (1986) 84 Mich.L.Rev. 1296; Note, *Seeing in a Mirror Dimly? Clergy Malpractice as a Cause of Action: Nally v. Grace Community Church*, (1986) 15 Cap.U.L.Rev. 349; Case Note, *Religious Counseling--Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide* (1985) Ariz. St.L.J. 213;

we are interested in a somewhat broader question--the duty of non-therapist[4] counselors whether they be religious or secular in their orientation. Our research has not uncovered any court decision which has ruled one way or the other specifically on the existence or scope of a *non-therapist* counselor's duty toward suicidal counselees. On the other hand, unlike most jurisdictions, the California courts have spoken clearly on the closely related issue of the duty of psychotherapists toward their suicidal patients. Logic and policy both dictate the duty announced in those cases applies to non-therapist counselors as well.

[12] We first recognize with the sole exception of homicide that suicide is by far the most serious consequence which can flow from mental illness. Thus someone who chooses to counsel a person exhibiting suicidal tendencies may assume a duty which does not attach to the counseling of persons with lesser mental or emotional problems. That is the duty to take appropriate measures to minimize the likelihood the suicide will take place.

[13-14] It is a question of law whether one person has a duty of due care toward another--as is the more specific question of whether he has assumed such a duty by establishing a "special relationship" with that person. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561.) Under general principles of Anglo-American law applicable in California it is

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Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept* (1983) 19 Cal.WesternL.Rev. 507

[4] The term "nontherapist counselor" is used throughout this opinion to refer to counselors other than psychiatrists, clinical psychologists, or other categories of psychotherapist, who hold themselves out as capable of assisting mentally disturbed people.

clear a bystander watching someone about to leap off a cliff has no duty to attempt to prevent that suicide. Nor would he have a duty to suggest the suicidal individual see a psychotherapist or enter a psychiatric hospital. (Rest.2d, Torts, § 314; 4 Witkin, Summary of Cal.Law (8th ed. 1974) Torts, §§ 554-555, and authorities cited therein.) This is true even when it is reasonably foreseeable-- and indeed readily apparent--the individual will kill himself. The law simply does not require anyone to be a "good samaritan." (This view has not been without its critics, however. See, e.g., *Soldano v. O'Daniels (1983) 141 Cal.App.3d 443, 190 Cal.Rptr.310; Shapo, The Duty to Act; Tort Law, Power and Public Policy (1977); Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability* (1908) 56 U.Pa.L.Rev.217; Ames, *Law and Morals* (1908) 22 Harv.L.Rev.97; Rudolph, *The Duty to Act; A Proposed Rule* (1965) 44 Neb.L.J.499; Franklin, *Vermont Requires Rescue: A Comment* (1972) 25 Stan.L.Rev.51; Weinrib, *The Case for a Duty to Rescue* (1980) 90 Yale L.J. 247.)

But what does it take to acquire a duty to attempt to prevent that leap off the cliff? For one thing, in certain circumstances mere ownership of the "cliff" may be enough. A Federal court has held a hotel has a duty to take precautions against a suicidal leap from its building where others have jumped in the past. (*Sneider v. Hyatt Corporation* (N.D.Ga. 1975) 390 F.Supp. 976.) The court emphasized the hotel's knowledge of those former suicides and the obviously strange behavior the latest jumper exhibited when she checked in.

If "owning the cliff" is enough to create a "special relationship" with potential suicides, what about someone who offers to counsel those approaching the cliff about the emotional problems that might lead

them to jump off? California has taken the lead in answering this question. For two decades, it has imposed a duty on psychiatrists (and presumably all varieties of licenses psychotherapists) to prevent suicide among their patients.

This cause of action was first recognized in 1967. The case was brought against the hospital where the deceased was undergoing psychiatric treatment. The California Supreme Court held the hospital had a special relationship with their patients and a duty to take preventive measures where it appeared likely one of them might attempt suicide. (*Vistica v. Presbyterian Hospital* (1967) 67 Cal.2d 465, 62 Cal.Rptr. 577, 432 P.2d 193.) Any possible doubts this duty extends only to hospitals and not the individual practitioners who treat patients was dispelled a year later in *Meier v. Ross General Hospital* (1968) 69 Cal.2d 420, 71 Cal.Rptr. 903, 445 P.2d 519. There the court expressly approved a cause of action against both the hospital and the doctor who was treating the patient who committed suicide.

In *Bellah v. Greenson* (1978) 81 Cal. App.3d 614, 146 Cal.Rptr. 535, a California Court of Appeal confronted the issue whether this duty extends to psychiatrist who are counseling patients outside a hospital setting. The court had no difficulty deciding it does. "[T]he complaint alleged the existence of a psychiatrist-patient relationship between defendant and Tammy [the suicide], knowledge on the part of the defendant that Tammy was likely to attempt suicide, and a failure by defendant to take appropriate preventive measure. We are satisfied that these allegations are sufficient to state a cause of action for the breach of a psychiatrist's duty of care towards his patient. The nature of the

precautionary steps which could or should have been taken by defendant presents a purely factual question to be resolved a trial on the merits, at which time both sides would be afforded an opportunity to produce expert medical testimony on the subject. . ." (81 Cal.App.3d at p. 620, 146 Cal.Rptr. 535). Moreover, the court observed this duty has existed under accepted principles of California law for many years. (81 Cal.App.3d at p. 623, 146 Cal.Rptr. 535.)

[15] These cases happened to involve psychiatrists and hospitals. Nonetheless, the duty they announced applies likewise to counselors, other than licensed psychotherapists, who hold themselves out as capable of dealing with mental and emotional illness severe enough to lead to suicide. We find no grounds in reason or policy for considering psychiatrist to have a "special relationship" with their suicidal counselees but other varieties of counselors not to have assumed a "special relationship" with their suicidal counselees. The person being counseled has a similar if not identical dependence on the counselor--whether the latter is a psychiatrist or some other type of counselor. The counselor, in turn, has voluntarily undertaken that relationship. Indeed, whether a psychiatrist or not, the counselor usually has invited the counselees's dependence by holding himself out as especially competent to treat emotional problems. Accordingly, we hold the non-therapist counselor who has held himself out as competent to treat serious emotionally disturbed person has a duty to take appropriate precautions should that person exhibit suicidal tendencies.[5]

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[5] In an analogous context, we note the Ninth Circuit has held a public school may have a duty in tort to take adequate precautions

[16] We emphasize this duty does not extend to personal friends emotionally disturbed people may consult for advice and counsel about their problems. Unlike counselors--therapists and non-therapists alike--the ordinary person has not held himself out as possessing any expertise in treating emotional problems and invited a special relationship of dependence with seriously disturbed individuals. Similarly, it is easy to distinguish "teen hotlines" or analogous services which only offer short-term "band aid" counseling since they have not undertaken a sufficient "special relationship" with the counselee to justify imposition of a duty to prevent foreseeable suicides. Nor do we hold a duty arises when a parishioner approaches a pastor after morning services for some casual advice about his

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to prevent suicide when it is apparent one of those students is suicidal. (*Kelson v. City of Springfield* (1985) 767 F.2d 651.) In this case, a student brandished a revolver and threatened suicide. The school authorities took some steps but not others in an attempt to deal with him. A few minutes later the boy shot himself. The parents sued alleging the school had been negligent, especially in failing to provide personnel adequately trained in suicide prevention. The trial court dismissed the complaint, but the Ninth Circuit reversed. "The Kelsons' complaint contains no allegation that the deprivation of their liberty interest resulted form the execution of an official public policy, custom or practice. The complaint does, however, contain allegations that [the school] had a duty to provide suicide training to [its] employees, and that it failed to do so." (767 F.2d at p. 656.)

A public school undertakes to educate the members of its student body. If that undertaking is enough to require the school to take adequate precautions when on the those many students exhibits suicidal tendencies, a fortiori, a counselor of mentally disturbed people has that duty where he has undertaken to counsel with people about the very mental condition which can lead to suicide.

emotional problems. In the instant case, inn contrast, there is ample evidence the Church's pastoral counselors were more than personal friends giving young Nally some incidental amateur advice about his emotional problems as an act of friendship. There also is ample evidence demonstrating the Church's pastoral counselors were offering and giving something far beyond short-term "band aid" counseling or " casual advice." Indeed the Church was advertising its counselors were competent to treat a full spectrum of serious as well as less serious emotional problems. Furthermore, the evidence indicates the Church's pastoral counselors actually had an ongoing counseling relationship with young Nally that stretched over a five-year period.

[17] This does not mean the standard of care expected of a non-therapist is exactly the same as what would be expected of a full-fledged psychiatrist or other licensed psychotherapist. Ordinarily the non-therapist counselor has less education and experience in diagnosing and treating seriously mentally ill persons. This affects the standard of care to which they can be held. Non-therapist counselors have no duty to take appropriate precautions against a suicide unless that suicide is foreseeable to *them*. Thus they would no violate their standard of care where the counselee's behavior would lead a therapist to foresee suicide but would not lead a therapist to foresee suicide but would not lead a non-therapist counselor to that same conclusion. (Compare *Bogust v. Iverson* (1960) 10 Wis.2d 129, 102 N.W.2d 228 [director of testing center had no diagnostic training or experience hence suicide not foreseeable and wrongful death action dismissed] with *Sneider v. Hyatt Corporation, supra*, 390 F.Supp 976 [hotel employees could foresee guest was suicidal

because of this guest's bizarre behavior and past suicides at hotel.)

[18] Once the Suicide is foreseeable, the lesser standard of care imposed on non-therapist counselors also may affect the precautions against suicide they reasonably can be expected to take. In most instances these counselors lack the authority to hospitalize a potential suicidal individual or to administer anti-depressants or other drugs which might forestall a suicide.[6] Likewise they may lack the training and experience to personally deal with this level of mental disturbance and prevent the suicide through mere words. However, once they have diagnosed the individual counselee as a foreseeable suicide they do have the ability to refer the person to those who do have the authority and the expertise to prevent suicides.[7] Accordingly, the minimal standard of care a non-therapist owes to a counselee he diagnoses as suicidal is to take steps to place him in the hands of those to whom society has given the authority and who by education and experience are in the he best position to prevent the suicidal individual from succeeding in killing himself.[8]

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[6] For a discussion of the statutory scheme which authorizes certain mental health professionals and others to initiate involuntary hospitalization of suicidal person, see page 234, *infra*.

[7] With respect to religious counselors there may also be reasons grounded in the Constitution for limiting their liability to the failure to refer (and where necessary, to warn). To inquire into the content of their counseling and whether what these religious counselors said to a suicidal counselee was reasonably calculated to prevent suicide may impinge on their right to "free exercise" of religion. (See pp. 235-236, *infra*.)

[8] "Ethical therapists do not employ diagnostic or treatment procedures that are beyond the scope of their training, nor do they

One commentator, himself a rabbi, has urged that religious counselors in particular should be held to this standard of care, that is, that they be liable in tort if they fail to place counselees they diagnose as suicidal in the hands of those individuals and institution better suited to prevent suicide. "We can . . .analogize the relationship of the clergyman and the professional psychiatrist or psychologist to that of general practitioner and specialist. Just as the medical general practitioner has the duty to call in a specialist if a reasonably careful general practitioner would do so under the circumstances, so the first duty of the clergyman should be to recognize when the problem is beyond his skill and refer the congregant to one with more specialized training." (Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice, supra,* 9 San Fernando Val.L. Rev. 47, 63.) We further note there was extensive testimony in the record of this trial from expert witnesses in pastoral counseling. These witnesses said the standard of care for pastoral counselors required them to refer suicidal individuals to those in a better position to prevent suicide.

[19] The duty to refer a physically ill but mentally healthy individual to a specialist who can treat his life-threatning illness is, often quite different from the duty to refer a mentally disturbed person to a facility authorized to prevent him from killing himself. This is especially true when the mentally disturbed counselee

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accept clients whose personal functioning is seriously impaired, unless they are qualified to work with those clients. A therapist who becomes *aware of his her lack of competence* in a particular case has the *responsibility. . .to make a referral.*" (Corey, Theory and Practice of Counseling and Psychotherapy (1977) 213, 316; italics added.)

has stated he wants to end his life and soon. The physician treating the physically ill but mentally healthy patient ordinarily fulfills his duty to refer merely by telling the patient will head for the specialist's office by the fastest means of transportation he can find. A counselor treating a mentally ill person--especially one who wants to die and die soon--can make no such assumptions. Frequently, the counselee is too mentally disturbed to accept and follow this advice. And indeed the advice often is contrary to the counselee's own expressed wishes. Nevertheless, in many instances, the standard of care expected of counselors treating suicidal counselees indeed can be satisfied merely by telling the counselee he should see a psychotherapist or go to a psychiatric facility about his suicidal feelings. But where it becomes apparent the counselee is resistant a jury could reasonably find the counselor should have taken further steps, which on occasion may include informing those in a position to prevent the counselee's suicide about the factors suggesting the counselee harbors imminent plans to kill himself.

The dissent argues a counselor cannot face liability for failing to commit suicide because of *Bellah v. Greenson, supra* 81 Cal.App.3d 614, 146 Cal.Rptr. 535. In that case, a Court of Appeal held a psychiatrist could not be found liable for failing to warn the family of a patient about his suicidal tendencies. The court justified this ruling by holding the policies behind the statutory privilege of confidentiality between psychotherapist and patient outweighed the need to reveal the patient's confidential communications to the family.

There are two vital difference, however, between *Bella* and the instant case. First, here there is no

statutory privilege whose legislative policies must be overcome. Neither the psychotherapist-patient privilege nor the clergyman-penitent privilege applies to communications between a pastoral counselor and his counselee. (*Simrin v. Simrin* (1965) 233 Cal.App.2d 90, 94 [communications made to a clergyman in the course of marriage counseling do not qualify for the clergyman-penitent privilege]. This same conclusion was reached in *People v. Edwards* (1987) 194 Cal.App.3d 430, 239 Cal.Rptr. 526, where a communication to an Episcopal priest was deemed to have been made in the context of pastoral counseling rather than a confession and thus did not qualify for the clergy-penitent privilege. However, rehearing has been granted as to this or some other issue in this case. If a statutory privilege did apply a court could not require disclosure without confronting and overcoming the legislative policy of absolute confidentiality expressed in the statute. This courts are rightly quite reluctant to do. Thus, they do so only when the need for disclosure is overwhelming as when the patient states and immediate intent to kill a specific third person. (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 131 Cal.Rptr. 14, 552 P.2d 334.) The *Bellah* court was unwilling to find the interest in having a psychiatrist disclose the suicidal intentions of his patient to the family was enough to justify the extraordinary step of finding this policy overpowered the legislative intent expressed in the statutory psychotherapist-patient privilege. But in the instant case there is no expressed legislative intent to overcome. If there is to be a policy supporting confidentiality of communications between pastoral or secular non-therapist counselors and their counselees we as a court would have to create that policy.

The second distinction between *Bellah* the suicidal patient already was in the hands of someone authorized to administer medication and to initiate involuntary hospitalization. In another holding the *Bellah* court recognized a longstanding duty of due care the psychiatrist owed to take reasonable precautions to prevent suicide. Under this ruling, the psychiatrist could well have been held liable for negligently failing to administer medication or to initiate hospitalization which might have prevented the suicide. Thus the failure to apprise the family of the patient's suicidal intentions in *Bellah* did not prevent the patient from being placed in the hands of someone authorized to prevent suicide because the patient already was in those hand. In the instant case, however, the failure to disclose Nally's imminent intent to kill himself not only to the family, but more importantly to professionals authorized and equipped to prevent suicide, did have this unfortunate consequence. Thus, the interest served by disclosure in the instant case was much weightier than the interest that would have been served by disclosure in *Bellah. Whether this interest would be enough to overcome a statutory privilege preserving the confidentiality of communication between pastoral counselors and their counselees we need not decide. For, as we already have pointed out, there is no statutory privilege and thus no expressed legislative intent to overcome.*

We concede there is some public purpose served by preserving a measure of confidentiality between non-therapist counselors and their counselees. Presumably the latter will be more forthcoming with their counselors if they know their confidences will not be shared with others and thus the counseling may be more effective. But this policy goal must be balanced

against the values served by disclosure of certain information to certain people under certain circumstances. We are not persuaded the policy favoring some confidentiality for counselor-counselee communications is enough to justify silence when a counselee's very life is at stake. Accordingly, we hold the interest in disclosure is sufficient to impose liability where a reasonable standard of care would require the counselor to warn someone authorized to prevent an imminent suicide.

To sum up, we hold religious counselors, along with secular counselors, have a duty with regard to suicidal counselees. In appropriate cases, moreover, a jury could reasonably find the standard of care can be satisfied only placing a suicidal counselee in the hands of those best able to prevent these counselees from killing themselves. This by no means should be construed to require the religious counselors to disengage, however. There is no duty for them to abandon their counselees or to stop giving them religious counseling. The legal responsibility, where it exists, is instead in the affirmative--to insure their counselees also are under the care of psychotherapists, psychiatric facilities, or others authorized and equipped to forestall an imminent suicide. The church's duty to train its counselors to suicide prevention, in turn, is dependent upon and coextensive with the counselors' duty toward suicidal counselees. Since we hold the counselors have the duty as outline above, the Church has a companion duty to insure its counselors are aware of these responsibilities and how to discharge them. Accordingly, we hold count 2 of the complaint likewise states a cause of action.

B. *The Evidence the Church's Counselors Breached Their Duty as Non-Therapists Counselors Was Sufficient to Overcome a Nonsuit Motion*

B. *The Evidence the Church's Counselors Breached Their Duty as Non-Therapist Counselors Was Sufficient to Overcome a Nonsuit Motion*

Setting aside for the moment any First Amendment considerations, we hold the Church's counselors had a duty to take appropriate measures to prevent Nally's suicide. Moreover, we find the evidence submitted at trial was sufficient to overcome a nonsuit motion on the following issues:

> **(1) Nally's suicide was foreseeable to the Church's counselors. The counselors themselves testified young Nally had told them he intended to commit suicide after his release from the hospital. This and other facts known to the counselors were enough to make the suicide foreseeable even to an ordinary citizen possessed of similar knowledge.**

(2) The Church's counselors failed to satisfy the non-therapist counselor's minimal standard of due care by neglecting to refer Nally to psychiatrists or a psychiatric hospital or other mental health professionals society has authorized and equipped to minimize the risk Nally would commit suicide. Although the evidence was conflicting there was

testimony even from the Church's counselors themselves which could have led a jury to reasonably conclude they had failed to encourage young Nally to consult a psychotherapist and indeed said things which discouraged him from doing so. The jury likewise reasonably could have concluded the Church's counselors, knowing Nally was not consulting with psychotherapists, failed to share vital information with Nally's parents or with medical doctors treating him or with any psychotherapist, any of whom might have decided to intervene to commit him to a mental health facility. Of special significance was Nally's statement he intended to kill himself after he left the hospital. He made this statement only to the Church's counselors. Because they did not pass this information along to hospital staff or Nally's parents young Nally was released. Shortly thereafter, he fulfilled his promise to take his life.

We find this evidence sufficient, when construed most favorably to appellants, to justify a reasonable juror in finding the Church's counselors negligently breached their duty to effectively refer Nally to those who were authorized and equipped to prevent an imminent suicide. We likewise find the evidence sufficient to sustain a finding the Church negligently breached its duty to train its counselors in their responsibilities. Admittedly, we also find sufficient evidence in the record for a reasonable juror to have concluded some or all of the Church's counselors actually exercised reasonable care in attempting to refer Kenneth Nally to mental professional authorized and equipped to prevent an imminent suicide. But this latter finding, of course, is entirely irrelevant when deciding on the propriety of a nonsuit.

C. *Constitutional Guarantees of Freedom of Religion Do Not Immunize the Church's Counselors from Satisfying a Standard of Care Which the Jury May Find Required Them in This Case to Refer Nally to Those Whom Society Has Authorized and Equipped Prevent Suicide*

Grace Community Church and its counselors argue they are constitutionally exempt from any duties or standard of care the law may impose on secular counselors. They base this claim of immunity on the First Amendment guarantee of the right to "free exercise of religion"[9] According to their argument, counseling by "pastoral counselors" is a form communication of religious belief analogous to preaching from the pulpit. To impose liability for negligent counseling in their communication of religious belief and thus would impinge on their right to "free exercise of religion."

1. *The Basic Principles of the "Free Exercise" Clause*

Religious freedom is guaranteed American citizens in just 16 words in the First Amendment. "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise* thereof;. . ." (U.S. Const., Amend. I; italics added.) As can be seen,

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[9] All discussion in this opinion as to the freedom of religion provisions of the U.S. Constitution applies also to respondent's claims under Article I, section 4 of the California Constitution which guarantees "[f]ree exercise and enjoyment of religion without discrimination or preference."

it creates two very different protections. The "establishment clause"--actually an '*anti*-establishment clause"--guarantees us the government will not use its resources to impose religion on us. The "free exercise clause," on the other hand, guarantees us government will not prevent its citizens from pursuing any religion we choose.

The "establishment clause" comes into plan when a government policy has the effect of promoting religion--as by financing religious schools or requiring religious prayers in public schools, and the like. These policies violate the establishment clause unless they survive a three-part test. They must have a secular purpose. Their primary effects must be ones which neither advance nor inhibit religion. And they must avoid any excessive entanglements with religion. (*Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-613, 91 S. Ct. 2105 2111, 29 L.Ed.2d 745; see also *Committee for Public Education v. Nyquist* (1973) 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948; *Abington School Dist. v. Schempp* (1963) 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844.) However, to hold "pastoral counselors" to the same standards as secular counselors in no sense tends to establish or promote religion. Hence the instant case does not raise potential objections under the "establishment clause" and we have no occasion to confront the three questions which must be satisfied when a governmental policy does have the effect of furthering religion. [Moreover, assuming the "establishment clause" were relevant, the discussion of the "free exercise" clause on the following pages demonstrates those three questions could be answered in a way which supports the constitutionality of the pastoral counselors' duty to refer mentally disturbed suicidal counselees. That is, the following discussion

shows this duty not only serves a secular interest but a *compelling* secular interest (pp. 234-235, *infra*). The primary purpose and effect is to diminish the frequency of suicide not to advance or inhibit any religion (pp. 234-235, 236, *infra*). And finally, the duty as recognized in this opinion avoids any unnecessary or excessive entanglement with religion (pp. 235-236, *infra*).]

Whether the "free exercise clause" requires us to exempt "pastoral counselors" from the duty to prevent suicide presents a more difficult issue. The "free exercise clause," was adopted without debate or comment when the First Congress deliberated the Bill of Rights. (Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1976).) Thus the courts have turned to other writings by those responsible for the Bill of Rights, especially James Madison and Thomas Jefferson, to divine the meaning the "free exercise of religion."

[21,22] The subsequent cases interpreting these four words make it clear that while the free exercise clause provides absolute protection for a person's religious *beliefs*, it provides only limited protection for the *expression* of those beliefs. (*Cantwell v. Connecticut, supra*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903-904, 84 L.Ed. 1213; *Bowen v. Roy* (1986) 476 U.S. 693, 106 S.Ct. 2147, 2152, 90 L.Ed. 2d 735.) Freedom of belief is absolutely guaranteed, freedom of action is not. Thus government cannot constitutionally burden any belief no matter how outlandish or dangerous. But in certain circumstances it can burden an expression of belief which adversely affects significant societal interest. To do so, the burden on belief must satisfy a four-part test: First, the government must be seeking to further an

important and some opinions suggest a compelling--state interest. Secondly, the burden on expression must be essential to further this state interest. Thirdly, the type and level of burden imposed must be the minimum require to achieve the state interest. Finally, the measure imposing the burden must apply to everyone, not merely to those who have a religious belief; that is, it may not discriminate against religion. A straightforward exposition of three prongs of this test is found in *United States v. Lee* (1982) 455 U.S. 252, 257-258, 102 S.Ct. 1051, 1055-1056, 71 L.Ed.2d 127 where the Supreme Court held: "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. (Citations omitted.)" All four are mentioned in *Braunfeld v. Brown* (1961) 366 U.S. 599, 607, 81 S.Ct. 1144, 1148, 6 L.Ed.2d 563: "If the purpose of effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid. . .But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the stature is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden." (See also *Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U>S. 707, 101 S.Ct. 1425, 67 L.Ed2d 624; *Wisconsin V. Yoder*(1972) 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15; *Gillette v. United States* (1971) 401 U.S. 437, 91 S.Ct. 838, 28 L.Ed.2d 168; *Sherbert v. Verner* (1963) 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965; *Cantwell V. Connecticut, supra,* 310 U.S. 296, 304-305, 60 S.Ct. 900, 903-904.)

A Review of the Supreme Court's "free exercise" rulings makes it apparent these factors are interrelated.

Roughly speaking, the heavier the burden the government imposes on the expression of belief and the more significant the particular form of expression which is burdened, the more important the state interest must be. Or to put it the other way around, the more important the interest the state seeks to further, the heavier the burden it can constitutionally impose on the more important forms of expressing religious belief. Thus, only the most compelling of state interest--such as the preservation of belief or of the state itself--will justify an outright ban on an important method of expressing religious belief. (See, e.g., *Reynolds v. United States* (1878) 98 U.S. (8 Otto) 145, 164, 25 L.Ed. 244 [polygamy can be outlawed even though a central religious tenet of the Mormon religion because it "has always been odious among the northern and western nations of Europe . . . and from the earliest history of England . . . has been treated as an *offense against society*." [Italics added.)]; *Prince v. Massachusetts* (1943) 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 [parents can be prohibited from allowing their children to distribute religious literature even though this is a religious duty required in order to avoid "everlasting destruction at Armageddon" where necessary to protect the health and safety of youth]; *Jacobson v. Massachusetts* (1904) 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 [adults and children can be compelled to be vaccinated for communicable diseases even though their religious beliefs oppose vaccination because as was observed in *Prince v. Massachusetts, supra*, 321 U.S. at pp. 166-167, 64 S.Ct. at p. 442, "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death"].)

But a less significant state interest may be enough where the burden is less direct or the form of expression less central to the exercise of the particular religion. (See, e.g., *Goldman v. Weinberger* (1986) 475 U.S. 503, 106 S.Ct. 1310, 89 L.Ed. 2d 478, where the military's apparently rather marginal interest in absolutely uniform attire was enough to justify an outright ban against a Jewish officer's apparently rather marginal form of religious expression in waring a yarmulke [a religious cap] indoors; *Bowen v. Roy, supra,* 106 S.Ct. 2147, where the Federal government's interest in administrative convenience in preventing fraud in a benefit program was enough to justify the minimal burden of denying benefits to those who because of religious beliefs refuse to obtain and reveal social security numbers. In this case, the burden was deemed slight enough that it could be constitutionally justified by showing it "is a *reasonable* means of promoting a *legitimate* public inters." (*Id., at p. 2156, italics added); Braunfeld v. Brown* (1961) 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 where Chief Justice Warren holds the governmental interest in prohibiting economic activity on Sundays is enough to justify imposing the burden of an economic loss on those orthodox Jews who choose to exercise their religious belief that they not work on Saturdays and thus lose two rather than only one day's opportunity to earn money. "[T]he case before us . . . does not make *unlawful* any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs *more expensive.*" (366 U.S. at p. 605, 81 S.Ct. at p. 1147; italics added.)

2. *Any requirement They Refer Does Not Impose Any Burden on the Free Exercise of Religion by Grace Community Church's Pastoral Counselors Because This Responsibility Is Not Inconsistent with Their Religious Beliefs*

[23] Before the "free exercise clause" even comes into play it must be established the governmental policy in question indeed asks a person to do something against his religious beliefs or to desist from doing something this religious beliefs require him to do. The fact someone has a personal preference--not grounded in religion--to disobey a law in no way invokes the sacred protections of the Freedom of Religion guarantees of the Constitution. Even where he claims he disobeyed because of his religion it is an issue of fact whether he sincerely entertains a religious belief that is inconsistent with obedience to the law. Otherwise the law could be continually frustrated by people willing to make false claims about the beliefs espoused by their religions. (See *United States v. Seegar* (1965) 380 U.S. 163, 185, 85 S.Ct 850, 863, 13 L.Ed.2d 733 and *Theriault v. Carlson* (5th Cir.1974) 495 F.2d 390, 395, both holding courts can inquire whether parties claiming to hold certain religious beliefs actually subscribe to them.)

This principle was explored extensively in *Wisconsin v. Yoder, supra* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15. In this case the Supreme Court ruled the sate cannot compel Amish children to continue in school beyond the eighth grade. The Court justified this exemption from the state's compulsory education law only after examining the religious beliefs of the Amish

and their way of life. On the basis of this review the Court concluded education beyond the eighth grade indeed would encroach "on their rights and the rights of their children to the free exercise of. . . religious beliefs . . ." (406) U.S. at p. 215, 92 S.Ct. at p. 1533.) The Court explained the need to determine whether the Amish refused to follow this law because of their religious beliefs rather than because of personal preference or philosophy. "[T]o have the protection of the Religion Clauses, the claims must be rooted religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and refection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of hi time . . . their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." (406 U.S. at pp. 215-216, 92 S.Ct. at p. 1533.)

To illustrate, we now have Supreme Court authority the Amish need not send their children to school beyond the eighth grade. This does not mean Methodist parents could avoid the compulsory education law for their children where that religion has no objection to education beyond the eighth grade. Nor would the Court be foreclosed by the First Amendment from inquiring into the actual beliefs of the Methodist Church if the parents claimed their religion opposed education beyond this level. Moreover, the parents

would have to prove any personal beliefs they held which opposed post-eighth grade education were religious in nature and not matters of personal preference or philosophy.

[24] In the instant case, the evidence fails to establish the Grace Community Church or its counselors hold any religious belief which would preclude them from fulfilling any responsibility the jury may find requiring them to refer suicidal counselees to those authorized and best suited to prevent young Nally from taking his life. Indeed there was substantial evidence--including testimony from the senior pastor, Reverend MacArthur--to the effect the Church's doctrine, beliefs, and counseling practices are perfectly consistent with a referral to a psychiatrist or other nonreligious psychotherapeutic resource. With the exception of one of the Church's counselors, other excuses were given, having nothing to do with religious ideology, for failing to refer Nally to a psychiatrist or psychiatric hospital. True, the remaining counselor testified he was personally opposed to referring counselees to "non-Christian" psychotherapist. However, his testimony was not very precise as to whether he was expressing a genuine *religious* belief. Indeed the jury could have reasonably construed this testimony to reflect a personal preference not a religious belief, analogous to a Freudian psychoanalyst saying he would not refer a patient to a 'non-Freudian" therapist. Moreover, nothing in this testimony suggested this counselor had any objection--religious, personal, or otherwise--to referring a counselee to a "Christian" psychotherapist.[10] There was evidence "Christian"

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[10] The dissent quotes extensively from this counselor's testimony

psychotherapist exist--one of the witnesses, for instance, testified he was a "born again Christian" psychiatrist. Accordingly, even as to this counselor the evidence was sufficient to find he did not entertain a religious belief which he would have had to abandon in order to comply with the duty to refer Kenneth Nally to someone authorized and equipped to prevent suicide. At the least he could have reconciled his religious beliefs and his legal duties by referring the young man to a "Christian" psychotherapist.

Even if freedom of religious expression were a defense to a lawsuit for breaching the counselor's duty to refer suicidal counselees to psychiatric facilities, it is an issue of fact whether the defendant's religion actually prohibited such referrals. One the record before the trial court when it heard this nonsuit motion, it was reasonable to conclude the Grace Community

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(Dissent, pp. 244-245, fn. 6 *infra*) and construes it to prove he holds a *religious* belief against referring a counselee to a secular counselor. Actually his testimony is ambiguous at best. Even if a reasonable judge or juror could construe what this counselor said as expressing a true *religious* belief, it is at least equally possible for a reasonable judge or juror to construe it as only stating a personal preference or philosophy. The counselor never asserts it is against his religion to refer a counselee to a secular psychiatrist. Rather he describes what he "would" do "generally." In any even, he concedes he would have no compunction--religious or personal--about referring a counselee to a "psychiatrist [who is] coming from the viewpoint consistent with the scripture." Accordingly, it is clear even this counselor has no objections--religious or personal--which would have prevented him from referring Nally to at least one subgroup of professionals who are authorized to administer medication and initiate involuntary hospitalization, that is, psychotherapists who have a Christian orientation. It follows his failure to do so cannot be immunized from liability on "free exercise" grounds.

Church's counselors held no religious beliefs inconsent with referring Nally to those individuals or institutions authorized and equipped to prevent suicide. Accordingly, it was error to grant nonsuit on "free exercise" grounds.

3. *The State's Compelling Interest in Preservation of Life Justifies the Minimal Burden on Religious Expression Involved in Imposing Liability for Failing to Refer Suicidal Counselees to Those Authorized and Equipped to Prevent Suicide*

At the retrial of this case, respondents may well introduce additional evidence establishing that, after all, Grace Community Church's counselors actually do entertain religious beliefs inconsistent with fulfilling their responsibility to refer (and, if necessary, warn). In an effort to avoid yet another round of "judicial ping pong" between the trial and appellate courts we address the constitutional issue this factual finding would raise. Would the "free exercise" clause immunize the counselors and their Church from liability for failing to comply with the minimal duties of referral and warning which the law imposes on other counselors who are treating foreseeably suicidal person?

To Answer this question we apply the four criteria discussed earlier (see pp. 230-231, *supra*,) to the tort duty which imposes liability on all counselors, including the pastoral variety, who fail to refer foreseeably suicidal counselees to those best able to prevent suicide. Those criteria are: (1) the importance of the state interest this duty serves, (2) the necessity of

burdening religious expression to further the state interest, (3) whether the type and level of burden this duty imposes is the minimum needed to achieve the objective, and, (4) whether this duty somehow discriminates against religious counselors as opposed to other types of counselors.

(1) We have no difficulty holding California has a *compelling* interest in preventing its citizens from committing suicide. Society has a profound interest in preserving life and preventing death. Thus we treat murder as the most serious of crimes. Yet suicide has the same end result--the premature death of a healthy human being. Not surprisingly, therefore, we find government firmly committed to the prevention of suicide.

The State of California has an especially strong public commitment to suicide prevention. This commitment is evidenced by Penal Code section 401 which makes it a *crime* to participate in any way in another's suicide. This section provides: "Every person who deliberately aids, or advises, or encourages another to commit suicide is guilty of a felony." (Cal.Pen.Code, § 401.) It is further evidenced by the statutes calling for the restraint and commitment of mentally disturbed persons who are a danger to themselves, that is, suicidal. (See Cal.Welf. & Inst.Code, §§ 5150 et seq.) Significantly, these laws authorize certain professionals--but not "pastoral counselors"--to initiate involuntary commitment of suicidal persons.[11]

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[11] This statutory scheme provides:

"When any person, as a result of mental disorder, is a danger to others or to himself or herself,. . .a peace office, member of the attending staff. . .of an evaluation facility. . .designated members

(2) California's compelling state interest in suicide prevention is served by imposing liability on all those who undertake to counsel mentally disordered people and whose negligence allow counselees to commit suicide. Indeed as discussed earlier, the courts of this state already have extended this liability to hospitals and psychiatrist. (See cases and discussion at pp. 225-226, *supra.*)

The lives of mentally disturbed people who happen to go to a pastoral counselor are just as precious as those who go to a psychiatrist or some other mental health practitioner. The only way the public can guarantee the former will have as good a chance of surviving as the latter is if pastoral counselors have the same legal duty to take care that their counselees not kill themselves. If the public interest in suicide prevention is furthered by imposing a duty of due care on other counselors it also is furthered by imposing that duty on pastoral counselors. Accordingly, we hold exempting pastoral counselors from this duty would defeat a compelling state interest in suicide

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of a mobile crisis team. . .or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility. . .for 72-hour treatment and evaluation. . ." Cal.Welf. & Inst.Code,§ 5150.)

". . .The person shall be released before 72 hours have elapsed only if, the psychiatrist directly responsible for the person's treatment believes, as a result of his her personal observations, that the person no longer requires evaluation or treatment. . ." (Cal.Welf. & Inst.Code, § 5150.)

The medical staff can extend this 72-hour period for another fourteen days. (Cal.Welf. & Inst.Code,§ § 5250, et seq.) After a court hearing, a suicidal individual can be held for fourteen more days (Cal.Welf. & Inst.Code§ § 6250, et seq.)

prevention[12] while including them within the compass of this duty furthers this same compelling state interest.

(3) A governmental policy which burdens religious expression must be "narrowly tailored" so it achieves the desired state interest with a minimum of restriction on the free exercise of religious freedom. (*Thomas v. Review Bd., Ind.Empl.Sec.Div., supra,* 450 U.S. 707,718, 101 S.Ct. 1425, 1432; *Braunfeld V. Brown, supra,* 366 U.S. 599, 607, 81 S.Ct. 1144, 1148; *Sherbert v. Verner, supra,* 374 U.S. 398, 406, 83 S.Ct. 1790, 1795; see p. 230, *supra.*) Thus indirect burdens on religious expression are allowed where an outright ban or other direct interference would not. (See, e.g., cases discussed at pp. 231-232, *supra.*)

The instant case does not involve a "direct" burden on religious expression. The legal duty and reasonable standard of care recognized in this opinion in no sense prohibits the Church and its counselors from holding or expressing their religious views through the counseling of their parishioners or others. They remain free to counsel anyone, including those with the most serious mental disorders and even those who exhibit suicidal tendencies. The appellants have not argued nor

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[12] Since we decide pastoral counselors have a duty to prevent suicide we need not address the issue whether exempting religious counselors from this duty would violate the "establishment of religion" clause of the First Amendment. This clause general proscribes discriminatory treatment which favors religion unless the discrimination has a secular purpose and effect. (See p. 230, *supra,* and cases cited herein.) Here an exemption for religious counselors actually would impede rather than further a *compelling* secular interest. Accordingly, it would appear to raise serious constitutional problems.

has this court ruled the Church's pastoral counselors are liable in negligence merely for counseling or continuing to counsel someone whom they have reason to believe is suicidal. Accordingly, we need not reach the issue whether such an outright ban might be an "overly restrictive" rather than a "narrowly tailored" means of preventing suicide among those being counseled by pastoral counselors. [For this and other reasons, our rationale in this case in no way conflicts with a recent Ninth Circuit decision (*Paul v. Watchtower Bible and Tract Society of New York* (9th Cir. 1987) 819 F.2d 875] which held civil liability could not be imposed on members of a religion merely engaging in the religious practice of "shunning" former member of the religion. Here the Church and its counselors are not being held liable merely for engaging in religious counseling of suicidal individuals but for failing to discharge other duties of due care they owed those individuals.]

Likewise none of the legal responsibilities recognized this opinion prohibit the Church's counselors from relying on religious doctrine to deal with the counselees' mental disorders and emotional problems. Again the appellants have not argued for nor has this court ruled the Church's counselors could be held negligent because they espoused the teachings of Moses and Jesus instead of Freud and Jung. Nor have we held a cause of action could be stated for negligently choosing the "wrong" scripture to answer the particular problems of a given suicidal counselee, when other passages or other forms of religious advice might have forestalled his death. As a result, neither the trial court nor this court need probe the *content* of respondents' religious counseling or attempt to fudge its validity. Nor do we have to determine whether it is

feasible--or wise--to articulate a "standard of reasonable counseling" which can be applied to religious counselors of all faiths or to set different standards for each religion. (This issue has bothered more than one commentator--see, e.g., Ericsson, *Clergyman Malpractice: Ramifications of A New Theory, supra,* 16 Val.U.L.Rev. 163; Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise?", supra,* 84 Mich.L.Rev. 1296; Note, *Seeing in a Mirror Dimly? Clergy Malpractice as a Cause of Action: Nally v. Grace Community Church, supra,* 15 Cap.U.L.Rev. 349.) Consequently, we need not address the issue whether a rule which imposed liability on pastoral counselors who fail to give the "correct" religious advice to suicidal counselees would be "overly restrictive" instead of "narrowly tailored."

What this opinion has recognized instead is that the standard of care expected of religious or secular non-therapist counselors may in appropriate circumstances require them to refer suicidal counselees to those authorized to administer medication and initiate involuntary hospitalization. This responsibility exists independent of and in addition to the religious content of the pastoral counselors' other communications with their counselees. True, in those instances where a given religious counselor has a religious belief it is wrong for anyone to be treated by mental health professionals or to be committed to a mental health facility, we impose a burden on this religious expression by imposing financial liability if he fails to refer a suicidal counselee to this form of treatment. But this represent s a rather minor and indirect burden far less intrusive than an outright ban on religious counseling of suicidal people

or a requirement the religious counseling given be that best calculated to inhibit suicide.

We find this duty not only "narrowly tailored" but actually the care minimum required to achieve the state's compelling interest in preventing suicide among the sizeable population of mentally disturbed people who have elected to go to religious counselors rather than mental health professionals. It is a relatively nonintrusive way of insuring members of this population who exhibit suicidal tendencies are brought to the attention of those authorized to administer medication and, where appropriate, to place suicidal individuals in facilities which can restrain them from attempting to kill themselves. Indeed unless this duty is enforced the public policy behind California's legislative scheme for preventing imminent suicides will be frustrated in a goodly number of cases. For these reasons, we bind the duty this opinion recognizes is both "essential to accomplish and overriding governmental interest" (*United States v. Lee, supra,* 455 U.S. 252, 257-258, 102 S.Ct. 1041, 1055) and "the lease restrictive means of achieving [that] compelling state interest." (*Thomas v. Review Bd., Ind.Empl.Sec.Div., supra, 450 U.S. 707, 718, 101 S.Ct. 1425, 1432.)*

(4) No serious contention has or could be made the legal responsibility recognized in this opinion discriminates against religion in general or against Grace Community Church in particular. To be discriminatory against religion, it would have to apply only to religious counselors or to the pastoral counselors of this church. Instead we find this duty was recognized as applying to psychiatrists and psychiatric hospitals several years ago. (See p. 225, *supra.*) Today we recognize the responsibility to refer in appropriate cases extends no

only to religious counselors but also to other counselors who are not licensed psychotherapists. (See pp. 225-227, *supra.*) Indeed to exempt religious counselors from this comprehensive duty to prevent suicide would represent an act of discrimination *in favor of* religion; to include them, however, in no sense discriminates *against* religion.

[25] To sum up, we find California has a compelling state interest in preventing suicide which includes those mentally disordered people who have chosen to seek emotional counseling from pastoral counselors. We further find it promotes this compelling state interest to impose on all counselors, religious and secular alike, a standard of care which can in appropriate cases require them to refer in order that suicidal individuals reach those individuals and institutions society has authorized and equipped to administer medication and initiate involuntary commitments of people in danger of killing themselves. We further find imposition of this responsibility is a means "narrowly tailored" to achieve the compelling state interest in suicide prevention at the least possible cost to religious freedom. Finally, we find this duty is not discriminatory against religion in general or against the Grace Community Church in particular.[13] As a

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[13] *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882,88 L.Ed.2d 1148, upon which respondents place so much reliance, is not inconsistent with the principles discussed above. This case involved a mail fraud prosecution which required the government to prove the church's *beliefs* were *false* and would have sent the defendants to jail because they entertained those false *beliefs* The Supreme Court ruled it would violate the free exercise clause for the government to judge the truth or falsity of religious doctrine. In contrast, the instant civil action does not entail proof the Grace

consequence, we hold the First Amendment would not be offended even if this duty were imposed on a religious counselor who had a religious counselor who had a religious belief suicidal individuals should not be referred to or treated by mental health professionals.

IV. NONSUIT WAS NOT WARRANTED AS TO THE CAUSE OF ACTION FOR INTENTIONAL OR RECKLESS INFLICTION OF EMOTIONAL INJURY ALLEGEDLY LEADING TO YOUNG NALLY'S SUICIDE

The constraints of the law of the case, discussed above, prevent our considering whether the First Amendment bars this count. However, we note the constitutional principles considered in our discussion of the negligence counts serve only to reinforce the conclusion of the *Nally I* decision that the First

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Community Church's beliefs or those of their pastoral counselors are false. Instead it requires proof they could foresee young Nally was suicidal and, consistent or inconsistent with their beliefs about the proper remedy, failed to refer him to persons and institutions which are specially authorized and equipped to prevent suicide. It is as if, having discovered a fire, a night watchman only chanted "Fire, fire go away, come again some other day" rather that calling the fire department. It would be irrelevant whether the watchman failed to call the fire department out of laziness or plain orneriness or because he subscribed to a religion which believed the best way to put out fires is to chant "Fire, fire go away, come again some other day." If he had a duty of due care to prevent the spread of the fire or specifically to call the fire department he could hardly claim immunity from liability because his breach may have been prompted by religious belief. Nor would the subsequent lawsuit and trial constitute an undue interference with the watchman's right to free exercise of his religion.

Amendment does not immunize respondents from liability for any intentional or reckless acts they may have committed which encouraged young Nally to take his own life. Thus we turn to the question whether the trial court erred in excluding certain critical evidence and then granting the nonsuit motion as to this count on the ground of insufficiency of the evidence.

The trial court excluded an audio tape recording one of the defendants, Pastor Thomson, prepared for a series entitled "Principles of Biblical Counseling." This tape included the following discussion of Pastor Thomson's advice to prospective counselors on the subject of suicide.

"'And the suicidal says, "I am under such tremendous pressure, now I've got to have to [sic] pleasure of release! Now!, I don't care about the future." That's characteristic of human nature. So it is very characteristic of the suicidal that it is his hear of judgment that drives him into the death after which he will face that judgment, if he's an unbeliever. And after which if he is a believer, he'll go to be with the Lord. Yes, there'll be a loss of reward, but because of the Lord and his grace he'll go to be with the Lord. In fact, *suicide is one of the ways that the Lord takes home a disobedient believer.* We read that in the Bible. That death is one of the ways that the Lord deals with us. In the First Corinthians Eleven, verse 30 it says, "for this reason because you are not judging sin in your own life, many among you are weak and sick" and what, "a number sleep!." What's that mean? They've gone to bed? They've gone to bed for the night! What's that mean? Sleep? They're dead! That's right. And *suicide for a believer is the Lord saying, "Okay, come on home. Can't use you anymore on earth. If you're not going to*

deal with those things in your life, come on home."'"' (Italics added.)

This tape recording was the principal evidence Division One pointed to in support of its conclusion in *Nally I* that "a *reasonable inference* could be drawn that Grace Community Church and each of the individual defendants either followed a policy of counseling suicidal persons that, if one was unable to overcome one's sins, suicide was an acceptable and even a desirable alternative to living or reckless caused such persons extreme emotional distress through their counseling methods if those persons did not measure up to the pastors' religious ideals.[14]

At trial after remand, the lower court took the extraordinary step of excluding under Evidence Code section 352 the very tape recording the appellate court had held sufficient to sustain a reasonable inference the defendants had intentionally inflicted emotional suffering on appellants. In doing so, the trial court expressly found the relevancy of this recording was outweighed by the time it would consume, the danger it

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[14] We emphasize the *content* of the religious counseling given Nally is not relevant to the *negligence* claim which is based on the counselors' failure to live up to their independent, affirmative responsibility to refer Nally to those authorized and best suited to prevent his imminent suicide. The content of the religious counseling is relevant, however, to the second alternative theory of the "outrageous conduct" or intentional infliction of emotional injury" count as outline in the above passage from *Nally I*. According to *Nally I*, once the counseling is done with an intent to encourage suicide or with a reckless disregard of whether it will lead to suicide the counselors' "free exercise right are no longer sufficient to preclude a thorough inquiry into whether what they told this suicidal individual was likely to cause him to take his own life.

would unduly influence the jury and its tendency to confuse the issues and mislead the jury.

Evidence Code section 352 seldom, if ever, can justify exclusion of the principal available evidence relevant to a central issue in a case. Its purpose instead is to facilitate the expeditious determination of truth by allowing the trial court discretion to cull out evidence which is only marginally relevant, or cumulative, or pertinent only to marginal issues, or which might distract the jury from the central issues in the case. For this reason, the statute itself only sanctions exclusion where the probative value of the evidence is "*substantially* outweighed" by the probability its presentation will consume "undue" amounts of time, be "unduly" prejudicial, confuse the issues, or mislead the jury.

This audio tape actually is relevant in at least two ways. First, it is relevant as evidence of defendants' "state of mind" while counseling the plaintiffs' suicidal young son. Irrespective of the *content* of what the defendants might have said (or not said) to Kenneth Nally one of the elements of this cause of action which must be somehow proved by the plaintiffs is that the defendants counseled this young man with an intent or with reckless disregard as to whether he ended his own life. The statements contained in the tape recording are evidence of Pastor Thomson's own personal state of mind on the question of suicide and suicide counseling and how other counselors were trained on these issues. (For the proposition prior or future acts or declaration are admissible to prove state of mind when this fact is in issue, see *Zitny v. State Bar* (1966) 64 Cal.2d 787, 51 Cal.Rptr. 825, 415 P.2d 521; *Sprague v. Equifax Inc.* (1985) 166 Cal.App.3d 1012, 213 Cal.Rptr. 69; *Dinneen*

v. Younger 1943) 57 Cal. App.2d 200, 134 P. 2d 323; 1 Witkin, Cal. Evidence (3d ed., *supra*) Circumstantial Evidence, § 402.) The fact this tape was made more than a year after the counseling sessions may go to its weight but certainly not to its admissibility. These were expressions of permanent attitudes not transitory emotions or impressions. Thus what is true about this attribute of one's state of mind at the present time is highly relevant on the question of this attribute of one's state of mind a year or even several years earlier. (Cal.Evid.Code, § 1250(a)(1) [Statement of declarant's state of mind at the time admissible to prove declarant's state of mind at any other time the declarant's state of mind is an issue]; see, e.g., *People v. One 1948 Chevrolet Conv.CourpR (1955) 45 Cal.2d 613, 290 P.2d 538; Whitlow v. Durst* (1942) 20 Cal.2d 523, 127 P.2d 530; *Estate of Carson* (1920) 184 Cal. 437, 194 P.5; 1 Witkin, Cal.Evidence (3d ed., *supra,*) The Hearsay Rule, §§ 736-737.[15]

Secondly, the statements on the tape are relevant to prove the probable content of the counseling the defendants offered the plaintiffs' suicidal son. The tape recordings tend to establish the customary approach the Church's counselors used when counseling suicidal individuals. The customary approach, in turn, is relevant to prove what was said or not said in the counseling of this particular individual.

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[15] As to the hearsay as opposed to the relevance issue, certain of the statements on the tape recording could be construed as circumstantial evidence rather than direct evidence about the state of mind with which respondents counseled Nally. As such they would be admissible as non-hearsay instead of under the state of mind exception to the hearsay rule. (1Witkin, Cal.Evidence, (3d ed., *supra,*) The Hearsay Rule, § § 593-594.)

(Cal.Evid.Code, § 1105; *Brawthen v. H & R Block, Inc.* (1975) 52 Cal.App.3d 139, 124 Cal.Rptr. 845 [employer's instructions to prospective mangers admissible]; *People v. Memro* (1985 38 Cal.3d 658, 214 Cal. Rptr. 832, 700 P.2d 446; *Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 182 Cal. Rptr. 855; 1 Witkin, Ca.Evidence (3d ed., *supra,*) Circumstantial Evidence, §§ 349-350, 354.)[16]

The trial court sought to justify exclusion of the tape recording on grounds the 'best evidence" of what was said--or not said--during the counseling sessions was the defendants' testimony as to what they indeed said at the time. To begin with there were gaps, ambiguities and uncertainties in the defendants' testimony about these counseling sessions. In any event, the "best evidence rule" has only to do with the admissibility of copies of original writings, it has nothing to do with evidence of custom to prove someone acted consistent

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[16] It also is arguable these statements may be properly construed as statements of intent as to what should be and is said to suicidal individuals. Statements of intent, in turn, are admissible to prove actions were taken consistent with that intent. (Cal.Evid.Code,§ 1250 (a)(2) [statement of declarant's state of mind at the time admissible to prove the declarant's conduct then or at some other time.] True, these statements were recorded more than a year after the counseling sessions. But they purport to be statements of permanent and ongoing intent. Moreover, they do not purport to be statements only of what should be done in the future, but rather what should have been done in the future, but rather what should have been done in the past as well. The typical use of this exception has been to admit statements of intention to do some *future* act as evidence the act was done. (1 Witkin, Cal.Evidence (3d ed., *supra,*) The hearsay Rule, § § 752-756.) The statutory language is not so limited, however. Conceivably it could be stretched to cover this evidence. Nonetheless, since the tape recordings are relevant on other grounds we need not address this issue and decline to do so.

with this custom. Such evidence does not become inadmissible or necessarily even less relevant merely because an interested witness has stated his version to what actually happened on the occasion. (See, e.g., *In re Lopez* (1970) 2 Cal.3d 141, 84 Cal.Rptr. 361, 465 P.2d 257 [trial judge's testimony he had habit of informing defendants of their rights admissible to prove he so informed a specific defendant even though the defendant gave direct testimony the judge did no inform him of his rights].) The jury is free to disbelieve the witness' often self-serving account of what happened and to believe instead that people behaved in conformity with their customary pattern of conduct.

In any event, the trial court's rationale has no bearing whatsoever on the relevance of this tape recording as it relates to the vital element of the defendants' state of mind during these counseling sessions. For all these reasons, we find the trial court grossly underestimated the probative value of the statements in these tape recordings.

Judicial decisions stress the "probative value" side of the equation increases not only in proportion to its logical strength in supporting a certain proposition, but along two other important dimensions as well. First, the probative value which must be substantially outweighed increases as the proposition it tends to prove approaches--or possibly even is--one of the ultimate issues in this case. that is, one of the essential elements of a cause of action or defense. Secondly, the probative value which must be substantially outweighed also increases the less other evidence exists to prove the proposition the piece of evidence in question tends to support. (*People v. Stanley* (1967) 67 Cal.2d 812, 63

Cal.Rptr. 825, 433 P.2d 913; Jefferson, Cal. Evidence Benchbook, (2d ed. 1982) p. 589.)

This tape recording was high on all three of these scales of "probative value." The appellate court already had ruled the statements on the tape are enough to support a "reasonable inference" a certain proposition is true. This proposition--that defendants counseled appellants' son intentionally or with reckless disregard in ways that would produce his suicide--is, in turn, one of the elements of the cause of action and relates directly to another of the elements. Finally, appellants' primary witness to the counseling sessions and other tragic circumstances of this case--their son--is dead. Consequently, this tape recording is virtually the only evidence available to appellants on the issue of the respondents' state of mind during their counseling of this suicidal individual.

Meantime, there is little to weigh against the high probative value of this evidence. Given the fact the appellate court already ruled the statements on this tape recording give rise to a "*reasonable* inference" aoubt an esstional element of the cause of action, it is difficult to say admission of this tape recording would "confuse the issues" or "mislead the jury." As to the factor of "undue prejudice" evidence which tends reasonably to prove an essential element of a plaintiff's cause of action is, by definition "prejudicial" to the defendant's case. Yet this is not the kind of prejudice deemed "undue" and thus grounds for exclusion under section 352. Finally, it should not take an undue amount of time to present the tape recordings. It does not entail calling a host of witneeses to testify at length about a whole series of transactions. Instead it only involves the authentication and playing of an audio

PUBLISHER'S NOTE:

The following pages are unavailable for filming:

63, 64, 65, 66

Thus, had the CaliforniaLegislature decided at some time in the future to enact a legislative scheme requiring counselors to take certain precaustions against death among their suicidal counselees the the lawmakers could not have embraced religious counselors within the law--no matter how much they wanted to.

Sometimes the judiciary's duty to uphold the Constitution requires us to take the drastic step of withdrawing certain matters from the permissible scope of legislative action. On the rare occasions judges are compelled to do so they are not particularly surprise if someone condemns them for "judicial activism" or for engaging in "judicial legislation." This sort of criticism seems to come with the territory. However, it is a bit unusual to find the dissent leveling a similar charge even when, as here, we *decline* to deny government its constitutional power to achieve its

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counselors from any legal duty to do anything about their counselee's statements or behavior would have other serious consequences. Imagine a counselee had told one of the Church's counselors he intended to kill a specific person as soon as he could and showed the counselor the gun which he intended to use. Further, assume the counselor had every reason to believe what he was being told. The counselor says nothing to the police or to the intended murder victim. The counselee then takes the gun and kills his intended target. Are we really prepared to say the "free exercise clause" bars a lawsuit against the Church counselor for failing to warn the target or to take other reasonable precautions to prevent the murder even though a psychiatrist would be liable for a similar failure? We think not. Yet the broad scope of the "free exercise" immunity urged by the dissent appears to preclude a lawsuit against a religious counselor whether his inaction leads to murder or to suicide.

desired goals. Evidently this, too, comes with the territory.

At the beginning of this opinion we stressed this court has not taken it upon itslef to create some new, broad-gauged casue of action for"clergy malpractice." To the contrary, the most we have done is refuse to create a new, broad-gauged defense of "clergy immunity" for church-affliated counselors who are treating mentally disturbed, suicidal people. We have rejected this defense not because we have a low regard for religious freedom or the separation of church and state, but out of a profound reverence for those constitutional values--and for the value of human life.

DISPOSITION

The judgement granting nonsuit is reversed and the case remanded for further proceedings consistent with thi opinion. Appellants are awarded their costs on appeal.

THOMPSON, Acting P.J., concurs./

COLE,* Associate Justice.

I dissent.

Conceeding that it ventures "along a largely uncharted path" and that no court has rule one way or the other on the issue, the majority holds that non-therapist counselors, whether pastors or not, have duty to refer suicidal individuals to trained psychotherapist and that failure so to do constitutes negligence. In my view the holding simply is wrong, for a number of reasons.

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* Assigned by the Chairperson of the Judicial Council.

I

Course in general, and especially intermediate appellate courts, have no business making policy decisions of this nature on inadequate factual records of the sort here involved. The courts have no power to make law, but only to declare it as it exists.[d1] It is for the Legislature to enact law. The Legislature is equipped to hold fact-finding hearings and determine th empact of proposed legilsation before adopting it. We are not.

Nevertheless, the majority here purports to establish standards of conduct no just for those carrying out their religious duties at Grace Community Church, but for all persons of the cloth and, as well, for all whose professional work brings them into contact with suicidal people. There is no way at all for us to know the extent of the impact on such people. There are undoubtedly many, not licensed as psychotherapists, who nevertheless have regular contact with suicidally prone persons in the course of their work. Suicide prevention centers, teen hot-lines, and social service agencies all may be consulted in their professional capacities. While the majority, in dictum, distinguishes services which only offer "band aid counseling," the suggestion, implicit in the majority opinion, of potential liability of an indeterminate nature can only have a chilling effect on the giving of counseling at all.

The obligation imposed by the majority is variously, and loosely, phrased.[d2]

[d1] 16 Am.Jr.2d 843, (1979) Const.Law § 316.

[d2] "To refer counselees to those who possess these powers to prevent an imminent suicide" (majority opn. p. 226); "to refer. . .to

As set out, some of these requirements are impossible of attainment. The majority recognizes that the requirements come into play only when the suicidal person refuses to cooperate with a warning given to him or her by the counselor to consult with a psychotherapist voluntarily. So recalcitrance is indicated at the outset of the "duty" imposed. I fail to see how a counselee can be compelled to consult a psychiatrist or other licensed psychotherapist. While Kenneth Nally, the central figure of this tragic drama, is referred to as "young" (and was in fact young from the perspective of most of us), he was 24 at the time of hiis death and was an adult through all the time he had any connection at all with Grace Cathedral counselors. Short of an involuntary commitment by force of law, he simply could not have been compelled by anyone to see a licensed psychotherapist.

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those individuals or instituions authorized and specially suited to prevent suicide" (majority opn. p. 227); "to take stpes to place [a suicidal person] in the hands of those to whom society has given the authority and by education and experience are in the best position to prevent the suicidal individual succeeding in killing himself" (majority opn. p. 227); "informing those in a position to prevent the counselee's suicide about the factors suggesting the counselee's imminent plans to kill himself" (majority opn. p. 227); "duty to place their suicidal counselees in the hands of those best able to prevent these counselees from killing themselves" (majority opn. p. 229); "to *insure* their counselees also are under the care of psychothereapists, psychiatric facilities, or others authorized and equipped to forestall imminent suicide" (*ibid.*, italics added); "a duty to take appropriate measures to prevent Nally's suicide" (*ibid.*). In some places the duty is made more amorphous by leaving it to a jury to determine the extent of the obligation (majority opn. p. 229).

Apart from this, there is no legal obligation on anyone, including doctors, to take affirmative steps to prevent one who is not a patient from committing suicde. A doctor to whom a referral might be made by the counselor may well reject the referral. And, under applicable statues such as the Lanterman-Petris-Short Act[d3] a person "may" but is not required to insitute proceedings seeking an involuntary commitment. If the majority means that a counselor must insitute proceedings under the Act then, of course, it is rewriting the statute, a matter which I would have thought was for the Legislature.

Apart from this, who is the pastor or other counselor to call? If the suicidal person has a licensed psychotherapist presumably that docotr would be contacted. But the doctor, inn turn, can do no more than wait for the counselee to come in, short of starting involuntary proceedings. If the counselee has no licensed pshychotherapist, the pastor's obligation, as created by the majority is very difficult. Contacting a doctor who does not know the counselee and who has had no relationship with that person is futile, unless the counselee agrees to see the doctor. Each question asked about the extent of the duty spawns ten others.

No existing California decision compels the imposition of a duty to refer potential suicide victims to licensed professions, or to warn parents or others of the person's danger. It is ironic that the majority builds its argument on cases[d4] which culminate in a holding that

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[d3] Welfare and Institutions Code, section 5000 et seq. especially, section 5150 and section 5201.

[d4] *Vistica v. Presbyterian Hospital* (1967) 67 Cal.2d 465, 62 Cal.Rptr. 577, 432 P.2d 193, and *Meier v. Ross General Hospital*

licensed medical professionals have *no* obligation to disclose to third parties "vauge or even specific manifestations of suicidal tendencies on the part of the patient who is being treated in an outpatient setting."[d5] Thus the essence of the duty imposed by the majority is to require the disclosures which existing law has declined to require. For all of these reasons, alone, it is improper to hold that plaintiffs proved enough to get beyond the nonsuit motion. There are other reasons, as well, the principal one of this is the First Amendment.

II

Entirely apart from any other reasons why the majority incorrectly holds that potential liability can exist on the part of defendants, familiar First Amendment principles clearly stand in the way of liability. I have no quarrel with the professorial and exegetic discussion of the Amendment, undertaken in the abstract by the majority. But, the application of the Amendment to the facts of this case ignores the record and in particular ignores the fact that to reach their conclusion the majority must end up by preferring the

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(1968) 69 Cal.2d 420, 71 Cal.Rptr. 903, 445 P.2d 519, each held that a cause of action for wrongful death would lie where a hospital was negligent in not taking steps to prevent the suicide of an institutionalized patient, and Meier also extended liability to the treating doctor. *Bella v. Greenson* (1978) 81 Cal.App. 3d 614, 146 Cal.Rptr. 535, held that a psychiatrist might be held liable in negligence for failing to personally take measures to prevent the suicide of a woman under his care. The same decision, however, explicitly refused to hold that there was a duty on the part of the doctor to warn the woman's parents of their daughter's condition.

[d5] (*Bellah v. Greenson, supra,* 81 Cal. App.3d at pp. 620-622, 146 Cal.Rptr. 535.)

ecclesiatic views of some of the defendants (and indeed of some religious commentators) to those of at least one of the defendants.

In the first place, the opinion states that the duty to refer and inform does not impose any burden on the free exercise of religion on Grace Community Church's counselors "because this duty is not inconsistent with their religious beliefs that make it clear that he would not, for theological reasons, refer a counselee to a psychiatrist or psychologist except in the most limited circumstance.[d6] Other defendatns

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[d6] The testimony was as follow:

"Q. . .[1]Is there anything in your religion that says it's wrong for a person to see a psychologist or psychiatrist who might use medication to help depression?

A. I think there are two question there.

Q. Let me limit it to psychiatrists then.

A. I'm not talking about that. [1] In my understanding a psychiatrist is one who has world view from which he counsels as well as he is a medical doctor. [1] I like to differentiate the two because I believe that the emotional problems that are not physically caused are spiritual problems, and so to have the medication come from a doctor who is not necessarily going to counsel from a particular world view, I like to differentiate those two.

Q. Between the medical doctor and the psychiatrist?

A. Unless that particular world view is consistent with the scripture.

Q. Excuse me. [1] You are differentiating between a medical doctor and a psychiatrist; is that right?

A. Well, I may be in error, but in my understanding the psychiatrist is the counselor plus the medical doctor whereas the medical doctor or the practitioner or what ever you want to call him would not have the psyuchological world view that I would be coming from and counseling with regard to.

Q. Yes, and that's the distinction you are making between medical doctor and the psychiatrist?

testified that they had no particular religious concern about such referrals. Thus, the majority's imposed obligation of referral to those who by education and experience are in the best position to prevent a potential suicide from killing himslef would directly impinge on Mr. Thomson's beliefs, It would pick and choose between those beliefs and the beliefs of others. By ordering conduct consistent with the view of the other defendants, it rejects Mr. Thomson's views as infufficient to accomplish the pastoral purpose of helping suicidal individuals. It seemingly rejects his testimony that the Bible gives the root answer to why emotional or pyschiatric problems exist. It also ignores the fact that a counselee himself might have firm religious convictions committing him or her, as an individual to the views of someone such as Mr. Thomson. In effect, the majority has found one set of views to be false or not adequate, some think which it

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A. And so for a person to have medication prescribed from whomever, I don't see a problem with that.

Q. Even if it's a psychiatrist?

A. That's true.

Q. To make sure we're on the right track then, Pastor Thomson, your religion , your theology, sees no problem with the simple fact that a psychiatrist would use medication in treating someone's severe depression.

A. That's True. When I would refer, however, I would refer to a medical doctor.

Q. Not a psychiatrist?

A. Generally unless I believed that psychiatrist were coming from the view point consistent with the scripture.

Q. And so when you make a referral, you make a referral to a medical doctor who is not a psychiatrist for that exact reason?

A. Unless I know that the psychiatrist is coming from a viewpoint which I know of and consider as consistent with God's word, yes."

may not do. (*United States v. Ballard* (1944) 322 U.S. 78 86-87, 64 S.Ct. 882, 886-887, 88 L.Ed. 1144.) "[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." (*Fowler v. Rhode Island* (1953) 345 U.S. 67, 70, 73 S.Ct. 526, 527, 97 L.Ed. 828.) It violates the amendment when courts pick and choose between one religious view and another. (*Id.*, at p. 69, 73 S.Ct. at p. 527.) ". . . Nor is it the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers. They cover a wide range and have as great a diversity as the Bible or other Holy Book from which they commonly take their texts. To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over antoher. That would be precisely the effect here if we affirmed this conviction in the face of the concession made during oral argument. Baptist, Methodist, Presbyterian, or Episcopal minister, Catholic priest, Moslem mullahs, Buddhist monks could all preach to thier congregations in Pawtucket's parks with impunity. But the hand of the law would be laid on the shoulder of a minister of this unpopluar group for performing the same function." (*Id. at p. 70, 73 S.Ct. at p. 527.) In the present case one of plaintiffs' own expert witnesses when asked, "where does spirituality leave off and psychology begin?" sated, "Well, I don't think Jesus Christ would touch that one. . .There's no anwer to such a question. They are intermingled."*

In the second place, the burdens placed upon religion by the mojority do not meet at least one, if not more, of the criteria stated as necessary to be met in curtailing expressions of belief on the theory that an important state interest must be protected. Thus, *United States v. Lee* (1981) 455 U.S. 252, 257-258, 102 S.Ct. 1051, 1055, 71 L.Ed. 2d 127, held "The State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." But, as shown above in discussing the duty to refer, there is no showing that his duty is "essential" becuase there is great doubt that it would work at all, short, at least, of also making mandatory the involuntary confinement of all potentially suicidally inclined person.[d7]

[d7] While there clearly is a state interest that its citizens not commit suicide, the strength of that interest is diluted, to say the least, by statutory recognition that even in the context of mentally disordered people (among whom may be included suicidal individuals) lay medicine must give way to the practice of religious beliefs. Thus, Welfare and Institutions Code section 5006, part of Lanterman-Petris-Short Act, states that the act "shall not be construed to deny treatment by spiritual means through prayer in accordance with the tenets and practices of a recognized church or denomination for any person detained for evaluation or treatment who desires such treatment. . ." And section 7104 of the same code, states with reference to county psychiatric hosptial: "Any adult person detained in such hospital, who is in such condition of mind as to render him competent to make such application shall at his request be exempt from medical or psychatric treatment, upon filing with the superintendent a statement, upon filing with the superintendent a statement that he depends upon prayer or spiritual means for healing in the practice of the religion of a well-recognized religious church, sect, denomination, or organization. In case of an adult not found to be in such condition of mind, a similar statement may be filed on his behalf by another and

In the third place, recognizing that in limited circumstances *conduct* in the name of religion may be regulated even though beliefs, as such, may not be suppressed, here the majority *comels* action, while transgressing belief. The difference is crucial, and is well illustrated in *Reynolds v. United State (1878) U.S. (8 Otto) 145, 163, 25 L.ed. 244. There, as unanimous court found that polygamy was offensive in Anglo-American and European nations, that there wer explicit criminal statues forbidding the practice, and that one such statue, enacted by congress, did not trangress the First Amendment in light of th historical purpose of the Amendment, even though memebers of the Mormon Church had embraced polygamy as one of their beliefs. In looking at the history of the events which led to the Amendment, the court quoted a Virginia statute which had been drafted by Thomas Jefferson (12 Hening's Stat. 84) noting that, "after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at one destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil goverment for its officers to interfere when principles break out into overt acts against peace and good order'..." The Supreme Court then said, "In these two sentences is found the true distinction*

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thereupon similar exemption shall be granted. . ."

Numerous other statutes, dealing with the licensing of health care professionals, and the conduct of medically related schools exempt or limit the regulation of religious practice. E.g., Business and Professions Code section 1000-1000-16 (chiropractic); 2063 (medicine); 2731, 2789 and 2800 (nursing); 2863 (vocational nursing); 2908 (psychologists); and 4508 (psychiatric technicians).

between what properly belongs to the church and what to the State." (Reynolds v. United States (1878) 98 U.S. (8Otto) at p. 163, italics added.) In the present case, no principles have broken out into overt acts against the public peace or good order.[d8] Instead, the majority form the opinion that because suicide ought to be prevented it is up to them to detemine how todo that, because of what the majority concludes to be "the ill tendency" of defendants' religious conseling. ". . . The test for upholding a direct burden on religious practices is as stringent as any imposted under our Constitution. Only in extreme and unusual cases has the imposition of a direct burden on religion been upheld. . ." (*Paul v. Watchtower, etc., Society* (9th Cir.1987) 819 F.2d 875.) The danger must be grave and immediate. (*People v. Woody* (1964) 61 Cal. 2d 716, 719, fn.2, 40 Cal.Rptr. 69, 394 P.2d 813.) The present case is not of that character.

While much more could be said on the subject, the fact that this is a dissent, and the hope that the majority's view ultimately will not prevail make it unneccessary and unwise to extend this opinion on this subject.

[d8] While based onstatutory grounds, *Northrup v. Superior Court* (1987) 192 Cal.App.3d 276, 237 Cal.Rptr. 255, illustrates that the State of California does subordinate interest in the lives of its citizens to religious principles. In the case, unlicensed midwives did not call in the services of medical professions. Instead, consonant with the principles of their religion which precluded reference to physicians, they presided at three childbirths, in two of which the babies were stillborn. The court struck down a criminal prosecution for practicing without a license, noting that section 2063 of the Business and Professions Code squarely exepmted the midwives from being licensed.

III

The majority holds that it was error for the trial court to excluse, under Evidence Code section 352 (section 352), the contents of a tape recording, and that the recording would help plaintiffs establish a cause of action for intentional or reckless infliction of emotional injury. The majority is in error, in my opinion.

In 1981, Mr. Thomson taught a series of classes on the subject of Biblical counseling. The classes included question and answer sessions. Tape recordings were made of these classes. During one of them, a student asked a question concerning whether a person who committed suicide could be saved. Pastor Thomson gave an extemporaneous answer to the question which relicted th pastor's own religious beliefs.[d9] This included the statement quoted by the court in NallyI. Plaintiffs unsuccessfully sought to introduce this tape recording, along with others. Their contention was that it provided inferential proof of what Pastor Thomson might have said to Kenneth Nally during the three counseling sessions that Mr. Thomson had with Kenneth in early 1979.

The trial court held two extended hearings on the admissibility of the recordings. Mr. Thomson testified at each of these sessions. His testimony was that he did not remember precisely what he told Kenneth during the counseling sessions, but that it would have been

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[d9] "Suicide is one of the ways that the Lord takes home a disobedient believer. . .Suicide for a believer is the Lord saying, "Okay, come on home. Can't use you anymore on earth. If you're not going to deal with those things in your life, come on home.' "

different than the religious beliefs expressed to the students in the Biblical counseling class. He remembered that Kenneth had asked one question as to whether a person who committed suicide could be saved. The thrust of his answer was that one who had accepted Christ was saved from past, present and future sins, but that it would be wrong to commit suicide.

The trial court sharply questioned counsel concerning the admissibility of the tapes in general (no issue is made on appeal as to the tapes other than the particular one quoted in footnote 9), and the statement made during the class on Biblical counseling in particular. The court was concerned with the relevancy of the tapes. It pointed out that constitutional principles precluded inquiry into the beliefs of the chruch. Plaintiffs' counsel argued at length that plaintiffs were trying to prove that the church had a *belief* against psychiatry and psyuchology, and that if the tape dealing with suicide was in evidence, it would be argued by plainteffs that it showed outradious conduct. Counsel continued to maintain that it was necessary to put church's beliefs into evidence in order to show its conduct.

The court then pointed out that the way to establish what Pastor Thomson said to Kenneth in 1979 was to ask the questions directly. After further argument, the court delineated the issues in the case[d10] and pointed

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[d10] "THE COURT: . . .One, that as counselors, the defendants--did the defendants have an obligation to recognize severe depression and/or suicidal tendencies, if they existed in Ken Nally. [1] Two, did they-- if they did recognize such severe depression or suicidal tendencies, did they have the duty to refer Ken Nally to a psychiatrist, a psychologist or some other professionsl in the field. [1] Three, again assuming they recognized the severe depression or

out that the court was not called upon to establish duties for pastoral counselors. The court then ruled that it would not admit the tape concerning suicide "on the basis that its relevancy is such that it would necessitate the undue consumption of time, would create substantial danger of undue influence to the jury and could confuse the issues and be misleading to the jury."

Section 352 provides that "the court in its discretion may exlucde evidence if its probative value is substantially outweighted by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." As in all cases where discretion is called for, it may not be exercised arbitrarily. A balancing process is called for which requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it. (*Kessler v. Gray* (1978) 77 Cal. App. 3d 284, 291, 143 Cal.Rptr. 496.) Evidence which merely encourages speculation should be exluced in civil cases just as well as criminal cases. (*People v. Bush (1978) 84 Cal.App.3d 294, 307, 148 Cal.Rptr. 430; Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 425, 94 Cal.Rptr. 49.)

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the suicidal tendency, did they have a duty to give that information to his parents so that they might take the appropriate action? [¶] Further, did they have a duty to, if they received information, tht is Pastor Rea in the hospital about a possible subsequent suicide attempt, did they have an obligation to turn that over to the treating physicians and deliver that information? [¶] Finally, was there outrageous conduct on the part of the church and the counselors which might have pushed Nally towards suicide or inevitably to his suicide?"

The question of remoteness of evidence is left to the sound discretion of the trial judge. (*Mathews v. Dudly* (1931) 212 Cal. 58, 60 297 P. 544; *Jennings v. Arata* (1948) 83 Cal.App.2d 143, 146, 188 P.2d 298. For example, in *Atkins v. Bisigier, supra,* evidence was offered to show that on a day one month after the accident at issue, the water ina swimming pool was cloudy. This was offered to prove the probable condition of the water at the time of the accident and to impeach testimony that the pool was always clean. The trial court excluded the evidence, and the appellate court affirmed pointing out that the evidence had been rejected as too remote and speculative and that the trial court had not abused its discretion.

"[T]he question of remoteness is one which rests so largely in the discretion of the trial court that no positive rule can be laid down, and for that reason the ruling of the trial judge as to the admission or rejection of evidence of this character will not be disturbed except upon a clear showing of an abuse of such discretion." (*Larson v. Solbakken* (1963) 221 Cal.App. 2d 410, 421, 34 Cal.Rptr. 450.) So, here what was said in an extemporaneous answer, which did not precisely reflect the thoughts of Pastor Thomson, given almost two years after the incident at issue is at best marginally relevant to prove what was said at the time in question. The trial judge made a carefully considered decision after considerable deliberation. The evidence was remote from the events at issue. Clearly, there was a basis for the trial court's ruling that admission of the tape created substantial danger of misleading the jury and prejudicing the defendants. No error occurred and the majority's conclusion to the contrary is not persuasive.

The law of the case doctrine does not mean that the trial court had to allow the challenged tape into evidence. The mere fact that it was referred to in *Nally I* did not magically insulate it from challenge under section 352. Since the prior opinion involved an appeal from a summary judgement, there had been no need nor basis for seeking a ruling under that secion. "The doctrine of the law of the case . . . does not extend to the facts or to points of law which might have been but were not presented and determined on a prior appeal." (*Steelduct Co. v. Henger-Seltzer Co., supra,* 26 Cal.2d 634, 644, 160 P.2d 804.) The admissibility of the tape was neither argued nor discussed in the trial court prior to the last appeal or in connection with the appeal. It cannot be said that it was necessarily determined and thus impliedy became part of the law of the case (*Id., at p. 642, 160 P.2d 804) since the tape was only part of the evidence, whichin the opinion of the majority in Nally I* prevented the entry of summary judgment.

Further, at the trial, folowing the dicision in *Nally I,* it was never argued by plaintiffs that law of the case principles compelled the admission of the evidence. If an opponent of evidence can be said to have waived an objection to the evidence by not raising the point prior to a first appeal (*Davis v. Edmonds* (1933) 218 Cal.355, 359) and thus become bound by an implied determination, then certainly a proponent of that evidence may waive the application the policy which finds expression as a mere rule of practice in teh law of the case doctrine. (*England v. Hospital of Good Samaritan* (1939) 14 Cal.2d 791, 97 P.2d 813; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 741, p. 710.)

IV

One more matter deserves brief mention. Upon granting themotion for nonsuit, the trial court observed that even if all of plaintiffs' evidence, including the proferred tape recording, was considered, plaintiff still had not proved that any conduct of defendants are correct in suggesting that to find causation a jury would have had, first, to infer that suicide was a concept religiously acceptable to Grace Community Church. Next, it would have had to make the not entirely logical assumption that because Mr. Thomson Made the Statements on the tape recording he expressed the same idea to Nally more than one and one-half years earlier. Then, the jury would have to infer that because of those comments Nally committed suicde. This is far too tenuous a factual path to support a judgment.

I would affirm the judgment of the trial court. It was right the first time when it granted summary judgment; it clearly was correct the second time when it granted the motion for nonsuit. There should be no third time.

APPENDIX G

APPENDIX G

Walter J. NALLY et al., Plaintiffs and Appellants,

v.

GRACE COMMUNITY CHURCH OF THE VALLEY et al., Defendants and Respondents.

Civ. 67200.

Court of Appeal, Second District, Division 1.

June 28, 1984.

Hearing Denied Aug. 30, 1984.*

Parents brought wrongful death action against church and its pastors after their son, who had been counseled by the pastors, committed suicide. The Superior Court, Los Angeles County, Thomas C. Murphy, J., granted defendants' motions for summary judgment, and plaintiffs appealed. The Court of Appeal, Dalsimer, J., held that: (1) substantial fact issues existed as to whether pastors engaged in extreme and outrageous conduct, either intentionally or recklessly, and whether their counseling was a substantial factor in causation of son's suicide, thereby precluding summary judgment in favor of defendants; (2) a cause of action for wrongful death arising out of intentional infliction of emotional distress was adequately pled by allegations that defendants, as agents of the church, knowing that son was depressive and had suicidal tendencies, exacerbated his feelings of guilt, anxiety, and depression with reckless disregard that their conduct would increase the likelihood that son would commit suicide and that, as a result of this conduct, son's depression increased causing him to

commit suicide; and (3) while defendant's religious beliefs were absolutely protected by the First Amendment to the United States Constitution, the free exercise clause did not license intentional infliction of emotional distress in name of religion and could not shield defendants from liability for a suicide caused by such conduct.

Reversed.

L. Thaxton Hanson, Acting P.J., dissented and filed opinion.

1. Judgment §181(33)

In action for wrongful death of son, who committed suicide, against church and its pastors, substantial fact issues existed as to whether the pastors engaged in extreme and outrageous conduct, either intentionally or recklessly, and whether their counseling was a substantial factor in causation of the suicide, thereby precluding summary judgment in favor of defendants.

2. Judgment §186

Summary judgment procedure is a drastic one and doubts as to propriety of granting a motion for summary judgment are to be resolved against the moving party.

3. Judgment §185(2)

A defendant moving for summary judgment has burden of showing that there is no triable issue of fact under any cause of action of the complaint.

4. Death §14(1)

A wrongful death action may be based on a theory that intentional infliction of emotional distress was a

substantial factor in bringing about the suicide of the decedent.

5. Death §46

A cause of action for wrongful death arising out of intentional infliction of emotional distress was adequately pled by allegations that defendants, a church and its pastors, knowing that plaintiffs' son was depressive and had suicidal tendencies, exacerbated his feelings of guilt, anxiety, and depression with reckless disregard that their conduct, in implying to him that suicide was an acceptable alternative to living if one was unable to overcome one's sins, would increase the likelihood that son would commit suicide and that, as a result of the conduct, son's depression increased, causing him to commit suicide.

6. Constitutional Law §84(1)

The free exercise clause of the First Amendment to the United States Constitution embraces both the concept of freedom to believe and freedom to act; the first is absolute but the second cannot be. U.S. C.A. Const.Amend. 1

7. Constitutional Law §84.5(10)

Counseling by a clergyman or church falls within concept of freedom to act, as embraced in the free exercise clause of the First Amendment to the United States Constitution, and not in the concept of freedom to believe. U.S.C.A. Const.Amend. 1.

8. Constitutional Law §84.5(7)

While defendant church and its pastors' religious beliefs were absolutely protected by the First Amendment to the United States Constitution, the free

exercise clause of the First Amendment did not license intentional infliction of emotional distress in name of religion and could not shield defendants from liability for a suicide caused by such conduct. U.S.C.A. Const.Amend. 1.

Law Offices of Edward Barker and Edward Barker, Los Angeles, for plaintiffs and appellants.

Samuel E. Ericsson, Los Angeles, and Cooksey, Coleman & Howard and David Cooksey, Tustin, for defendant and respondent Grace Community Church.

David Cooksey and Cooksey, Coleman & Howard, Tustin, for defendants and respondents Leslie Duane Rea, John MacArthur, Jr., Lynn Cory, and Richard Thomson.

DALSIMER, Associate Justice.

Plaintiffs, Walter and Maria Nally, appeal from the summary judgment in favor of defendants in this wrongful death action. Judgment was entered based upon an order granting the respective motions of defendants, Grace Community Church of the Valley, Pastor John MacArthur, Jr., Pastor Leslie Duane Rea, Pastor Lynn Cory, and Pastor Richard Thomson, Jr., for summary judgment.

The complaint alleges that Pastor MacArthur, acting as an agent of Grace Community Church, provided spiritual and personal counseling to plaintiffs' son, Kenneth Nally, that he negligently discouraged Kenneth Nally from receiving psychiatric or psychological counseling although he was aware that Kenneth Nally had suicidal tendencies, and that Kenneth Nally committed suicide because he did not receive essential psychiatric or psychological care and treatment. The

complaint also contains a cause of action for intentional infliction of emotional distress (captioned "Outrageous Conduct") in which it is alleged that each of the individual defendants, acting as an agent of the church, exacerbated Kenneth Nally's preexisting feelings of guilt, anxiety, and depression, knowing that Kenneth Nally had suicidal tendencies and that this conduct would increase the likelihood that Kenneth Nally would take his own life. It is further alleged that these acts were done "with reckless disregard of health, safety and well being of Kenneth Nally" and that, as a result of this conduct, Kenneth Nally's depression increased, causing him to commit suicide. The complaint further alleges that Pastor MacArthur and Grace Community Church negligently failed to require adequate training for their counselors.

[1] Pastor MacArthur's motion for summary judgment was based on excerpts from deposition transcripts and numerous declarations, each of which stated that the matters set forth were declared to be true to the best of the declarant's knowledge. Pastor MacArthur admitted in his declaration that he provided spiritual and psychological counseling to Kenneth Nally after a suicide attempt made by Kenneth Nally in March 1979. The excerpts of deposition transcripts included evidence indicating that Kenneth Nally was seen by a psychiatrist and various other physicians and that the church has referred its members to psychiatrists. The excerpts of deposition transcripts and the declarations did not indicate whether Pastor MacArthur engaged in extreme and outrageous conduct, either intentionally or recklessly, or whether his counseling was a substantial factor in the causation of Kenneth Nally's suicide. The evidence upon which Pastor MacArthur's motion for summary

judgment was based therefore failed to establish the lack of a triable issue of fact as to plaintiffs' cause of action for wrongful death occurring as a result of intentional infliction of emotional distress.

In opposition to Pastor MacArthur's motion for summary judgment, plaintiffs introduced a declaration of Walter Nally in which it was stated that on March 31, 1979 (one or two days before the suicide), Kenneth Nally pointed to his arm, which he had injured in a recent suicide attempt, and said that " 'they [people at the church] told [him] that this was God's punishment.' " On the Tuesday following Kenneth Nally's death, Pastor Rea told Walter Nally that this was not the first suicide of someone involved in the church and informed him that Kenneth Nally had been extensively counseled at the church by Pastor MacArthur. Plaintiffs also introduced a declaration of a psychiatrist who, having reviewed the testimony elicited in various depositions taken in this litigation, stated that it was his opinion that Kenneth Nally suffered from severe mental illness prior to his death and that defendants increased Kenneth Nally's despair and anguish, thereby causing him to commit suicide. Plaintiffs also introduced a deposition transcript excerpt in which Pastor MacArthur testified that "perhaps" he contributed to Kenneth Nally's depression. Pastor MacArthur admitted in his declaration which was introduced in support of the motion that, at the time he counseled Kenneth Nally, he was aware of Kenneth Nally's suicidal tendencies.

Grace Community Church, Pastor Rea, Pastor Thomson, and Pastor Cory filed a separate motion for summary judgment. The relied on the same declarations and deposition transcript excerpts that were

introduced in support of Pastor MacArthur's motion. Pastor Cory's declaration admitted that Pastor Cory provided informal counseling to Kenneth Nally. Pastor Rea's declaration admitted that, during some of the sessions in which he counseled Kenneth Nally, he was aware that Kenneth Nally had tried to commit suicide. His declaration further admitted that he taught courses in counseling at a bible institute affiliated with Grace Community Church. The declarations and excerpts of deposition transcripts did not indicate whether Pastor Rea, Pastor Cory, or Pastor Thomson, as agents of the church or independently, engaged in extreme and outrageous conduct, either intentionally or recklessly, or whether their counseling of Kenneth Nally was a substantial factor in the causation of his suicide. The evidence adduced in support of their motion therefore failed to establish the lack of a triable issue of fact as to plaintiffs' cause of action for wrongful death based on a theory of intentional infliction of emotional distress.

In opposition to the motion of Pastor Rea, Pastor Thomson, Pastor Cory, and Grace Community Church, plaintiffs introduced evidence that a tape by Pastor Thomson for a collection entitled "Principles of Biblical Counseling" contained the following statement: " 'And the suicidal says, "I am under such tremendous pressure, now I've got to have to [sic] pleasure of release! Now!, I don't care about the future." That's characteristic of the suicidal that it is his fear of judgment that drives him into the death after which he will face that judgment, if he's an unbeliever. And after which if he is a believer, he'll go to be with the Lord. Yes, there'll be a loss of reward, but because of the Lord and his grace he'll go to be with the Lord. In fact, suicide is one of the ways that

the Lord takes home a disobedient believer. We read that in the Bible. That death is one of the ways that the Lord deals with us. In the First Corinthians Eleven, verse 30 it says, "For this reason because you are not judging sin in your own life, many among you are weak and sick" and what, "a number sleep!" What's that mean? They've gone to bed? They've gone to bed for the night! What's that mean? Sleep? They're dead! That's right. And suicide for a believer is the Lord saying, "Okay, come on home. Can't use you anymore on earth. If you're not going to deal with those things in your life, come on home." ' " Depositions relied upon by defendants indicated that Pastors MacArthur, Rea, and Cory used counseling techniques similar to those used by Pastor Thomson and that each of the individual defendants was aware of Kenneth Nally's depression and his suicidal tendencies.

Plaintiffs also introduced evidence that, after Kenneth Nally's hospitalization in March 1979, Walter Nally opened Pastor Cory's office door during one of Pastor Cory's counseling sessions with Kenneth Nally and found Kenneth Nally on his knees and crying.[1] Pastor MacArthur specifically testified that spiritual counseling such as he admitted giving to Kenneth Nally causes "the deepest depression." From this evidence, a reasonable inference could be drawn that Grace Community Church and each of the individual defendants either followed a policy of counseling

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[1] Our founding fathers placed a high emphasis on freedom of religion and speech. The First Amendment to the United States Constitution, in pertinent part, declares that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof; or abridging the freedom of speech,. . .*" (Emphasis added.)

suicidal persons that, if one was unable to overcome one's sins, suicide was an acceptable and even a desirable alternative to living or recklessly caused such persons extreme emotional distress through their counseling methods if those persons did not measure up to the pastors' religious ideals.

[2-4] The summary judgment procedure is a drastic one, and doubts as to the propriety of granting a motion for summary judgment are to be resolved against the moving party. (*Stationers Corp. v. Dun & Bradstreet, Inc.* (1956) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449, 398 P.2d 785.) A defendant moving for summary judgment has the burden of showing that there is not triable issue of fact under any cause of action of the complaint. (*Ibid.; Tresemer v. Barke* (1978) 86 Cal.App.3d 656, 666, 150 Cal.Rptr. 384.) In California, a wrongful death action may be based on a theory that intentional infliction of emotional distress was a substantial factor in bringing about the suicide of the decedent. (*Tate v. Canonica* (1960) 180 Cal.App.2d 898, 909, 5 Cal.Rptr. 28) In *Tate v. Canonica, supra,* 180 Cal.App.2d 898, 908-909, 5 Cal.Rptr. 28, the court held that, if the defendant intended to cause serious emotional distress, the fact that the decedent knew what he was doing when he committed suicide would not relieve the defendant of liability for wrongful death. The court stated that this rule would not apply, however, where the act of the defendant was intentionally done, but where there was no intent to cause injury. (*Id.,* at p. 909, 5 Cal.Rptr. 28.) Since reckless disregard of the probability of causing emotional distress was not alleged, the court was not confronted with the question whether such an allegation would sufficiently plead the element of intent.

[5] In *Agawal v. Johnson* (1979) 25 Cal.3d 932, 160 Cal.Rptr. 141, 603 P.2d 58 the Supreme Court held that the element of intent in a cause of action for intentional infliction of emotional distress is established by proof that the defendant acted with reckless disregard of the probability of causing emotional distress. (*Id.*, at p. 469, 160 Cal.Rptr. 141, 603 P.2d 58.) The court there held that a prima facie case of intentional infliction of emotional distress has the following elements: " '(1) outrageous conduct by the defendant, (2) intention to cause *or reckless disregard of the probability of causing* emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress. [Citations.]" (*Ibid.*, italics supplied.) We hold that a cause of action for wrongful death arising out of intentional infliction of emotional distress was adequately pled by the allegations that the individual defendants, as agents of the church, knowing that Kenneth Nally was depressive and had suicidal tendencies, exacerbated his feelings of guilt, anxiety, and depression with reckless disregard that their conduct would increase the likelihood that Kenneth Nally would commit suicide and that, as a result of this conduct, Kenneth Nally's depression increased, causing him to commit suicide. (See *ibid.*; *Tate v. Canonica*, *supra*, 180 Cal.App.2d 898, 908-909, 5 Cal.Rptr. 28; cf. *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 287, 186 Cal.Rptr. 184, mod., 136 Cal.App.3d 1063c.)

The defendants' motions failed to establish that there was no triable issue of fact with respect to the count alleging that the suicide was caused by intentional infliction of emotional distress. Our Legislature has indicated its concern with the danger inherent in

encouragement of suicide by the enactment of Penal Code section 401, which provides, "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony." The depositions relied upon by defendants and the evidence adduced in opposition to the motion of Grace Community Church, Pastor Thomson, Pastor Rea, and Pastor Cory indicate that a trier of fact might well find that defendants engaged in extreme or outrageous conduct by deliberately encouraging Kenneth Nally to commit suicide or by either deliberately or recklessly increasing his intense feelings of guilt with full knowledge of his past attempts at suicide. (Cf. *Kelly v. General Telephone Co., supra,* 136 Cal.App.3d 278, 287, 186 Cal.Rptr. 184.)

[6, 7] We are thus confronted with the question whether a clergyman or church should become immune from liability for intentional infliction of emotional distress caused by the nature or content of counseling simply because the counseling may have a spiritual aspect. The free exercise clause of the First Amendment to the United States Constitution "embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213.) Counseling falls within the latter category.

In determining whether an action for intentional for intentional infliction of emotional distress may be maintained for counseling by a clergyman, we are guided by the analyses contained in *In re Edward C.* (1981) 126 Cal.App.3d 193, 178 Cal.Rptr. 694 and *Nelson v. Dodge* (1949) 76 R.I. 1, 68 A.2d 51. In

Edward C. the court affirmed an order removing children from the custody and control of their parents because the parents' religiously motivated discipline of the children was physically and emotionally detrimental to them. In addressing the parents' argument that the order involved an unconstitutional impairment of the parents' right to the free exercise of religion, the court stated, "Appellants further contend that the First Amendment to the United States Constitution, protecting freedom of religion, severely limits the power of the state to interfere with the parental right to direct the upbringing of their children. They correctly argue that the state must show that the parent's religious choices *do* jeopardize the health or safety of the child and that the state cannot override parental choice just because it runs counter to the tastes or lifestyles of the majority. [¶] Mistreatment of a child, however, is not privileged because it is imposed in the guise of freedom of religious expression. [Citation.] . . . . [¶] The evidence overwhelmingly supports the finding that appellants' home was an unfit place for Marlee . . . . The severe, repeated beating of Marlee for such childhood infractions as . . . inability to remember a Sunday school lesson amply demonstrate[s] the father's pitiless and unreasonable approach to discipline. The court could reasonably infer that the father, with Marlee removed, would substitute either one or both of the boys as an object of his ruthless drive for religious perfection . . . . [Citations.]" (*In re Edward C., supra,* 126 Cal.App.3d 193, 202-203, 178 Cal.Rptr. 694, original italics.)

In *Nelson* the leader of a church repeatedly threatened the plaintiff that he would suffer eternal damnation. The threats were sometimes accompanied by angry cries and howling and by the church leader

throwing herself on the floor and simulating vomiting. The defendant ultimately caused the plaintiff to become physically and emotionally ill and to ask if there was any hope for him. The defendant answered that God wanted the plaintiff to strip himself of all his possessions and donate them to her. The court imposed a constructive trust on those possessions because of the defendant's undue influence. (Cf. *O'Moore v. Driscoll* (1963) 135 Cal.App.770, 28 P.2d 438 [cause of action may be maintained against priest for false imprisonment that was religiously motivated]; *United States v. Spears* (5th Cir.1971) 443 F.2d 895, cert. den., 404 U.S. 1020, 90 S.Ct. 693, 30 L.Ed.2d 669 [use of drugs in religious ceremonies is not protected by free exercise clause of First Amendment].)

Although *Nelson* and *Edward C.* were not tort actions for intentional infliction of emotional distress, both cases affirm the principle that remedies should exist for harm caused by extreme and outrageous conduct even when such conduct involves the expression of religious beliefs.

Other jurisdictions have recognized that tort liability may be established for intentional infliction of emotional distress caused by a clergyman or religious institution. In *Lewis v. The Holy Spirit Ass'n, etc.* (D.Mass.1983) 589 F.Supp. 10, the court stated that a cause of action may be alleged against a religious organization and its leader for intentional infliction of emotional distress but held that allegations that the defendants negligently brainwashed the plaintiff were insufficient. In *Christofferson v. Church of Scientology, etc.* (1982) 57 Or.App.203l, 644 P.2d 577 , cert. den. (1983) 459 U.S. 1206, 103 S.Ct. 1196, 75 L.Ed.2d 439 and 459 U.S. 1227, 103 S.Ct. 1234, 75 L.Ed.2d 468, the

Oregon Court of Appeals held that a cause of action may be stated against a religious organization for intentional infliction of emotional distress but determined that insufficient evidence had been introduced to establish that plaintiff suffered sever emotional distress as a result of the defendants' conduct. We are in agreement with the principle recognized by these cases and by *Nelson* and *Edward C.*

[8] We hold that, while defendants' religious beliefs are absolutely protected by the First Amendment, the free exercise clause of the First Amendment does not license intentional infliction of emotional distress in the name of religion and cannot shield defendants from liability for wrongful death for a suicide caused by such conduct.

Because we have concluded that triable issues of fact remain as to whether Kenneth Nally's suicide was cause by intentional infliction of emotional distress, we need not also decide whether Pastor MacArthur had a duty to refer Kenneth Nally to a psychiatrist or other mental health professional or whether Pastor MacArthur or the church had a duty of psychological counseling. (See *Stationers Corp. v. Dun & Bradstreet, Inc., supra,* 62 Cal.2d at p. 417, 42 Cal.Rptr. 449, 398 P.2d 785; *Tresemer v. Barke, supra,* 86 Cal.App.3d at p. 666, 150 Cal.Rptr. 384.)

The judgment is reversed.

The judgment is reversed.

GUTIERREZ, * J., concurs.

L.THAXTON HANSON, Acting Presiding Justice, dissenting.

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* Assigned by the Chairperson of the Judicial Council.

I respectfully dissent. I would affirm the summary judgment. My reasoning follows:

PROCEDURAL HISTORY

On March 31, 1980, plaintiffs Walter J. Nally and Maria Nally, through their counsel filed in the superior court of Los Angeles a three count unverified complaint entitled "COMPLAINT FOR CLERGYMAN MALPRACTICE; WRONGFUL DEATH; NEGLIGENCE; OUTRAGEOUS CONDUCT" naming GRACE COMMUNITY CHURCH OF THE VALLEY, A NON-PROFIT CORPORATION (hereinafter Grace Church); JOHN MacARTHUR AND DOES I-L as party defendants.

In count I, designated "CLERGYMAN MALPRACTICE," plaintiffs in substance alleged that they were the father and mother and sole surviving heirs at law of the decedent Kenneth Mark Nally; that Kenneth Nally on April 2, 1979, committed suicide by self-inflicted shotgun would to the head in premises owned, operated and controlled by the defendants; that for many years and at the time of his death, Kenneth Nally was a member of the congregation of defendant Grace Church and John MacArthur was the pastor-teacher for Grace Church and the clergyman and minister for the congregation including Kenneth Nally; that in the role and relationship of clergyman, John MacArthur provided spiritual and personal guidance and counseling to Kenneth Nally and obtained the confidence of, and exercised influence and control over Kenneth Nally; that on or about March 12, 1979, Kenneth Nally took an overdose of the drug Elavil and received emergency treatment and was confined to intensive care at Verdugo Hills Hospital until his

discharge on March 17, 1979; that Kenneth Nally was diagnosed at that time as having a "depressive neurosis" and his treating and examining physicians and psychiatrist recommended that he receive outpatient psychiatric follow-up care; that John MacArthur visited Kenneth Nally during his hospitalization and was made aware of his physical and psychiatric condition and was otherwise aware of the depressive state and suicidal tendencies of Kenneth Nally from having functioned as his clergyman and having provided him spiritual and personal guidance and counseling; that following Kenneth Nally's release from the hospital, defendant John MacArthur took him into his home and while inn a position of control and influence over Kenneth Nally, actively dissuaded and discouraged him from seeking or receiving professional psychiatric or psychological care and counseling; that in the role of clergyman to Kenneth Nally, counseled him to consult with lay counselors on the staff of Grace Church, engage in prayer, read scriptures, and listen to tape recordings of sermons made by defendant John MacArthur; that notwithstanding the foregoing directions given to Kenneth Nally, defendant John MacArthur failed to make himself and lay counselors on the staff of the church available for counsel and guidance at such times as requested; and that by virtue of such acts and omissions alleged, that defendant J was negligent in failing to exercise the standard of care for a clergyman of his sect and training in the community which proximately resulted in Kenneth Nally committing suicide on April 2, 1979.

In count II, entitled "NEGLIGENCE," plaintiffs incorporated by reference all of the allegations set for the under count I (above) and further alleged that Grace Church and John MacArthur were aware that

lay counselors would provide psychological counseling to persons who has emotional, mental and psychological disorders which required a high level of skill and training and were negligent in not requiring the proper level of psychological training and background on the part of lay counselors: that the defendants performed in the role and relationship of lay spiritual and psychological counselors to Kenneth Nally, gaining the confidence and trust of Kenneth Nally and exercised influence and control over him; and that they were aware that Kenneth Nally was depressive, neurotic with suicidal tendencies and, "notwithstanding their knowledge thereof, actively and affirmatively dissuaded him from seeking professional psychological and/or psychiatric care for the aforementioned disorder."

In count III, entitled "OUTRAGEOUS CONDUCT," plaintiffs incorporated by reference the allegations in counts I and II *haec verba* and additionally alleged that the defendants were aware that Kenneth Nally was depressive, neurotic and had suicidal tendencies and that if he did not seek and receive professional psychiatric and/or psychological counseling and treatment that there was a strong likelihood and probability that he would commit suicide; that the defendants were aware "that Kenneth Nally came from a family background of Catholic religious training and that he had had respect for his parents and their adherence and beliefs in the Catholic faith"; that the defendants "ridiculed, disparaged, and denigrated the Catholic Faith and belief of plaintiffs herein" and "specifically indoctrinated Kenneth Nally that members of the Catholic faith were not christians and would not go to heaven upon their death"; that defendants "inculcated in Kenneth Nally the belief that he had betrayed Christ's love and trust, and

otherwise exacerbated Kenneth Nally's preexisting feeling of guilt, anxiety and depression"; that by virtue of defendants undue influence and control over Kenneth Nally effectively required him to spend time in isolation, prevented him from contacting or consulting with persons not affiliated with Grace Church and "yet did not make themselves available to Kenneth Nally when requested by him"; and that the foregoing "were done with reckless disregard of the health, safety and well being of Kenneth Nally and constituted outrageous conduct" proximately causing Kenneth Nally to become "so further guilt ridden, depressed and anxious that he was driven to take his own life."

On May 30, 1980, defendants filed a demurrer to plaintiffs' complaint along with points and authorities in support thereof and plaintiffs filed points and authorities in opposition to defendants' demurrer.

On June 13, 1980, defendants' demurrer was vigorously orally argued by both sides in the superior court before the Honorable Thomas C. Murphy, Judge Presiding. The demurrer was overruled and defendants given 30 days to answer. The court stated, ". . .by doing that, I am not determining who is right or who is wrong. We will take that down the long course."

On July 25, 1980, defendant Grace Church filed its answer to complaint and on May 6, 1981, answered to complaint was filed on behalf of Duane Read, Richard Thompson, and Lynn Corey, sued and served as DOES I through III, respective.

The answer consisted of a general denial and eight affirmative defenses, namely: *FIRST,* failure to state a cause of action; *SECOND,* violation of religious liberty guaranteed by the First Amendment of the United

State Constitution; *THIRD*,violation of the establishment clause in the First Amendment to the Federal Constitution; *FOURTH*, violation of the guarantees of religious liberty in article 1, § IV of the California Constitution; *FIFTH*, that the resulting injuries or damages, if any, were proximately caused and contributed to by the negligence of plaintiffs and decedent Kenneth Nally by not exercising ordinary care on their own behalf; *SIXTH*, barred by the statute of limitations as set forth in California Code of Civil Procedure, section 340; *SEVENTH*,violation of the guaranty of freedom of speech as provided in the First Amendment to the Federal Constitution; *EIGHTH*, violation of the guaranty of freedom of speech as provided in the First Amendment to the United States Constitution.

On July 2, 1981,defendant John MacArthur filed NOTICE OF MOTION FOR SUMMARY JUDGMENT; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF" to be heard on July 17, 1981, before Judge Murphy.

On July 17, 1981, plaintiffs filed their points and authorities in opposition to the motion for summary judgment; and in the alternative request for continuance. The reporter's transcript of July 17, 1981, show that defense counsel advised the court that a similar motion would be made on behalf of all the other defendants. The court continued the matter to October 2, 1981, and advised counsel to "Have your discovery completed within 40 days from today . . . We're going to rule on the merits at the time. If you cannot support your allegations, then I'm going to grant the motion. If there's any triable issue, no matter how slim, then we will try it on the one issue and have partial summary

judgment as to others. Define it and set it forth. O'Kay [[*sic*]? If you want to make a motion for partial summary judgment on some of the issues and you can sustain it on the merits, fine. Let's wrap this thing up once and for all. If we're going to trial on a single issue, let's do it."

On October 2, 1981, the hearing on defendants' motion for summary judgment was conducted. At the outset the court stated: "Gentlemen, I have read and considered your memorandums of points and authorities, also the opposition that has been filed, for the summary judgment. I'm aware of the other defendants who have now joined. I continued this, I think, about 90 days to give you an opportunity to do the discovery that you felt would be necessary to come up with, perhaps, facts that would offset their position that there's no triable issue. I'm now ready to listen. Go ahead."

Following extensive oral argument by counsel, the court granted summary judgment as to all defendants and made the following comments from the bench:

"Anything further? Does it stand submitted? [¶] Let me say something to you gentlemen, and those people in the audience who may or may not have an interest. [¶] I guess when we're quoting different people, I should go to one of my favorites, Harry Truman, who said, 'Gentlemen, need I remind you that the buck stops here.'. You are entitled to your opinions. You are entitled to your adversary positions. I must determine what goes forward, as a matter of law. [¶] If anybody is aggrieved at the fact that this court allowed this case to start 18 months ago, that is too bad. Under the law, if people allege certain things, this court has to look on it to see if a cause of action has been stated. At that particular time, there was no doubt that, on the basis of

the allegations, the raw allegations, there was nothing this court could do to end it at the particular time. [¶]. . .[¶] Now, I am just as religious, or maybe anti-religious, take your choice, as any person in this room. Religion has nothing to do with this particular case, as I see it. [¶] I gave everyone an opportunity to state their position. I brought counsel back from Washington because I felt that the Nallys had an absolute right to go in and discover any and all facts that they might want to discover by virtue of the laws of California and the rules of discovery. Apparently you have been very active, and apparently, as lawyers, you have done your job. You have furnished this court with reams of affidavits and reams of facts and positions. I have to sort them down. [¶] I have spent considerable time on it. I have listened patiently to you today. It is a tragedy, but there is a limit to what a court can or can't do. There is no one that I know of that can extend their hands, although I have heard some claims that hands can be extended and they at least heal the sick, but nobody, and I'm not being factitious [sic], can raise the dead in this room. Ken is gone. There is nothing we can do about bringing him back. The best the court can do, and I have done it, is give those who have a grievance, under the law and fitting it within the facts, a chance to come forward and state that, period. . . [¶] I have to say, counsel, that I have given you every opportunity. I have gone up one side and I have gone down the other. I have listened to your argument. You say in this declaration and in that declaration is this, that and the other thing. [¶] I see, and I so find, no triable issue of fact in this case at this particular time. . . [¶] As far as this trial court is concerned, the matter is closed. I commend all attorneys on their preparation, including you, counsel, and your partner. By no means do I ever

want to hear of any lawyer not coming into this court on a novel approach if he thinks his clients have a right that has been abrogated. [¶] That's no criticism of you, counsel, but I think your clients have--not equity, because I'm not here to do equity in this matter. This is a question of law. Equity on a usurpation, corporate usurpation, that falls within equity, and I must do it, but there's no need for equity here. You got justice. Grace Church got justice. Mr. MacArthur got justice. [¶] We are all accountable under the law. Even the President of the United States found that out sometime ago, and I'll make no further reference to it, but no one is above the law. Judges are responsible. Lawyers are responsible. If a complaint is made and it's properly alleged, they have an opportunity to come in and be heard, which they were. [¶] Mr. Nally probably feels that justice was not reached. That's too bad, Mr. Nally. As I said to them, I'm not here to do their laundry. I'm certainly no here to do yours. I feel much aggrieved about that boy, but that's the ruing."

ISSUES

On appeal, plaintiffs contend that there are "inherent triable issues of fact supporting the plaintiffs' position that the defendants had a duty to the decedent which they breached and which proximately cause his death" and the trial court abused its discretion by granting summary judgment. Plaintiffs further contend that there are no constitutional guarantees of religious freedom to preclude the courts from providing a forum for parents to seek civil damages from a church and its pastors for a son's death resulting from the nature and quality of counseling given to the decedent, Kenneth Nally.

Respondents/defendants, in their brief, characterize the causes of action in plaintiffs' complaint as consisting of three theories as a basis for recovery, namely: 1) a '*prevention theory*, i.e., that their son Kenneth Nally was *prevented* by defendants from seeking professional help not affiliated with Grace Church; 2) a "*duty to warn theory*,"i.e., that defendants breached some duty by not informing plaintiff parents and others of the things Kenneth Nally told them about himself and his feeling; and 3) a "*quality of counseling theory*," i.e., that the courts should serve as official pastoral counseling review boards examining the content and competence of spiritual counselors.

Respondents argue that neither law nor facts support any of plaintiffs' theories.

DISCUSSION

"The purpose of the summary judgment procedure is *not to try the issues*, but merely to determine *whether there are issues to be tried*." (Witkin, Cal. Procedure, (2d ed. 1971) Proceedings Without Trial, § 191, p.2840.) In short, "issue finding rather that issue determination is the pivot upon which the summary judgment law turn." (*Walsh v. Walsh* (1941) 18 Cal.2d 439, 441, 116 P.2d 62.)

" ' "Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent does not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue. The aim of the procedure is to discover, through the media of affidavits, whether the parties possess evidence requiring the weighing

procedures of a trial. In examining the sufficiency of affidavits filed in connection with the motion, the affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. Such summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining facts." ' (*Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal.3d 842, 851-852 [94 Cal.Rptr. 785, 484 P.2d 953], quoting from *Stationers Cor. v. Dun & Bradstreet, Inc.* . . .1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785].)" [¶] " ' " in determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the *admissible evidence* set forth in the papers and all inferences reasonably deducible from such evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact." (Italics added.) (Code Civ.Proc., § 437c.) [¶] "The remedy is designed to terminate an action promptly where the purported cause of action or defense is sham or otherwise wholly unfounded. But it is futile to seek the order where any basis for a cause of action or defense can be shown. In other words, the moving party should not confuse an opponent's *weak* case with *no case at all.* The [appellate] court, construing the moving party's affidavits strictly. . .and the counter affidavits liberally. . ., will reverse the summary judgmentif any kind of case is shown." (4 Witkin, Cal.Procedure (2d ed. 1971) Proceedings Without Trial, § 199, p. 2844.)' (*Bowden v. Robinson* (1977) 67 Cal.App.3d 705, p. 719 [136 Cal.Rptr. 871])." (Emphasis in original; *Fosgate v.*

Gonzales (1980) 107 Cal.App.3d 951, 954-955, 166 Cal.Rptr. 233.).

Applying the above rules to the pertinent part of the affidavits and depositions in light of the *unverified* complaint on file in the case at bench, the following appears:

Defendant John MacArthur's moving paper (applicable to all defendants), included the legal grounds previously set forth in the demurrer by Grace Church and John MacArthur on May 31, 1980, as well as eighteen (18) separate declarations and the deposition transcripts of both plaintiffs, Walter Nally and Maria Nally.

The following word picture can be gleaned from the voluminous record and the declarations and depositions filed by defendants in support of their motion for summary judgment.

In 1973, while attending the University of California at Los Angeles, Kenneth Nally (hereinafter Kenneth) became depressed after breaking up with his girlfriend. According to Robert Azzasrito's declaration, while at UCLA, Kenneth often talked about the ridiculousness of life, and occasionally mentioned thoughts of committing suicide. These discussions often centered around the problems Kenneth was having with his relationships with women and his family. Kenneth decided to convert from catholicism to protestantism. He began attending Grace Community Church soon thereafter. Kenneth's conversion became a source of tension between him and his family, especially his father, Walter Nally.

In 1975, Kenneth was seeing a psychologist at Shepherd's House due to problems he was having with a girlfriend.

After graduation from UCLA, Kenneth attended Logos Bible Institute at Grace Community Church from September 1976 to June 1977. He began dating a fellow student, Kathryn Thayer, in the summer of 1977. This relationship was unstable. According to Kathryn Thayer's declaration, Kenneth asked her how she felt about him seeking psychiatric help. She told him he should seek such help if he felt it would benefit him.

In January, 1978, Kenneth approached Grace Community Church's pastor, Leslie Rea, and requested "discipleship" time. The two men met on an irregular basis for the next six months. According to his declaration, Pastor Read concluded that Kenneth would not follow the advice given him and would always discuss the same basic problems, i.e., his relationships with his girlfriend and father.

Kenneth became further depressed after he Kathryn Thayer broke up on December 10, 1978.

In February 1979, Kenneth told his mother Maria Nally, that he could not cope. She arranged fro Kenneth to see Dr. Julius Milestone who prescribed Elavil, an anti-depressant.

During the first week of March 1979, Maria Nally arranged for Kenneth to see Dr. Mary Oda. Dr. Oda recommended that Kenneth undergo a series of blood test and chemical analyses.

On the afternoon of March 11, 1979, Kenneth spoke with a classmate, Jeffrey Zippi, concerning his frustration with his life. Jeffrey Zippi encouraged Kenneth to seek professional counseling including psychological help. Kenneth indicated that he had seen a psychologist in the past and that counseling did not work because the counselor wanted to discuss his past.

Upon being told that no one would be able to help him until he wanted help, Kenneth stated that the problem was that he probably really did not want help. That evening, Kenneth attempted to kill himself. His parents discovered him the following day and had him rushed to Verdugo Hills Hospital. He was admitted in a comatose state. Dr. Christine Evelyn told Kenneth's parents that Kenneth was still suicidal and she would not authorize his release unless Kenneth saw a psychiatrist. According to Dr. Evelyn's declaration, Kenneth and his family were very concerned over what people would think about Kenneth's suicide attempt. They asked her to tell people that Kenneth was being treated for pneumonia.

Pastor Lynn Cory visited Kenneth in the hospital and encouraged him to cooperate with the psychiatrists at the hospital. Kenneth was similarly encourage by Pastor Rea. According to Pastor Rea's declaration, Kenneth stated that he would attempt suicide again if given the chance.

On March 16, 1979, psychiatrist David Hall met with Kenneth and his father, Walter Nally, Dr. Hall discussed psychiatric hospitalization with them but they were resistant to the idea. Due to their resistance, Dr. Hall decided to use out-patient therapy. The first visit was scheduled for March 23, 1979.

On March 17, 1979, Kenneth was released from the hospital. Due to tensions at the Nally home, it was agreed that Kenneth would stay at Pastor John MacArthur's home for a few days. During his stay with the MacArthurs, Kenneth was encouraged to follow through with his outpatient therapy appointment. According to her declaration, Kathryn Thayer encouraged Kenneth to keep his appointments with the

doctor and psychiatrist at Verdugo Hills Hospital but Kenneth did no want to seek their help because they were not christians.

According to Patricia MacArthur's declaration Kenneth indicated to her that he "may attempt suicide again" to which she responded that suicide was wrong and that "our lifespan was solely up to God."

During the week of March 19, 1979, Pastor Richard Thomson arranged fro Kenneth to have a complete physical examination by Dr. Alban Bullock.

On March 23, 1979, the MacArthurs arranged for Kenneth to be examined by Dr. John Parker. Dr. Parker recommended immediate psychiatric hospitalization. Kenneth rejected this recommendation. According to Dr. Parker, he telephoned Walter Nally urging him to obtain psychiatric care for Kenneth immediately even if Kenneth objected. Dr. Parker stated that Walter Nally indicated he would call Dr. Hall to make the necessary arrangements. (Walter Nally denied ever receiving this recommendation).

According to Patricia MacArthur, she telephoned Walter Nally and urged him force Kenneth to undergo psychiatric hospitalization. (Walter Nally denied receiving this phone call).

Kenneth Nally did not keep his scheduled appointment with Dr. Hall on March 23, 1979. Walter Nally telephoned Dr. Hall that evening and they discussed psychiatric hospitalization. Dr. Hall offered to send an ambulance to pick up Kenneth but Walter Nally was reluctant to have his son taken against his will. Maria Nally was opposed to placing Kenneth in a "crazy hospital." (Uncontradicted.)

On March 26, 1979, Dr. Evelyn urged Kenneth to seek psychiatric care. (Uncontradicted.)

On March 27, 1979, Kenneth saw Dr. Alban Bullock. Dr. Bullock suggested that Kenneth undergo tests at Holy Cross Hospital to determine if there were any physical causes for his depression. (Uncontradicted.)

On March 28, 1979 Kenneth met with Dr. Richard Mohline. Dr. Mohline referred Kenneth to the Fullerton Psychological Clinic. (Uncontradicted.)

On March 31, 1979, according to Walter Nally's deposition, Kenneth's brother made a comment to Kenneth which hurt Kenneth's feeling. Walter Nally tried to talk to Kenneth and sho.. him the love he had for him, but Kenneth refused to listen stating, No, I don't want to listen. Nobody loves me." It was then that Walter Nally realized that Kenneth was in need of commitment. Walter Nally told his wife he needed to take a walk, and did so. Maria Nally sent Kenneth to retrieve his father. Kenneth drove down the street in his car, stopped briefly by his father. Walter Nally told his son "wait a minute, wait a minute. Where are you going? Why don't you come away with me? We can go together." Kenneth drove off. (Uncontradicted.)

On April 1, 1979, Kenneth entered a friend's apartment and committed suicide. (Contrary to the allegations of plaintiffs' unverified complain, it is uncontracdicted that Grace Church never owned, operated or controlled the property where Kenneth committed suicide.).

In late May 1979, Kathryn Thayer visited the Nallys. In a conversation with Mr. Nally, concerning Grace Church, Walter Nally told Kathryn Thayer that, "They wanted me to put by son in a mental hospital and I just couldn't do that. It would have killed

Kenneth and I just couldn't do that to my son." Mr. Nally emphasized this point top Kathryn. (Uncontradicted).

The papers filed by plaintiffs in opposition to the defendants' motion for summary judgment consisted of their points and authorities in opposition to defendants' demurrer including declarations of plaintiff Walter Nally, Stephen Wilson, M.D., and plaintiffs' attorney of record, Edward Barker. I will refer only to the portions of these declarations that adds or modifies something that was stated in the declarations filed in support of the defendants' motion for summary judgment.

In his declaration, Walter Nally stated that in 1974 he became aware that Kenneth was actively involved with Grace Community Church. Thereafter Kenneth began to proselytize his new found religion in their home and make anti-Catholic statements.

While Kenneth was at Verdugo Hills Hospital, Walter Nally heard Rod Anderson tell Pastor Mac Arthur that Kenneth would not be released until he had seen a psychiatrist. Pastor MacArthur replied, "[N]o, no. All they do is fill you up with pills and scramble your brain. I will take him. I will take him for a few days to my house."

On the evening of Thursday, March 29, 1979, Walter Nally drove with Kenneth for an appointment he had with Mr. Raup of the Fullerton Psychological Clinic. On their drive back, Walter Nally asked Kenneth what he thought of the psychologist and Kenneth told Walter Nally that Mr. Raup was not a good Christian and would not be able to help him.

Describing the last time he saw Kenneth alive, Walter Nally stated in his declaration: "On Saturday

morning, March 31, 1979, I was told by my wife that by younger son had made some remark to Ken about the condition of his arm and Ken appeared to me to be upset about that. I had a conversation with him in the bedroom and he seemed angry and upset. I told him I was sure that his brother did not mean to hurt him when he made the statement about the arm. Ken appeared agitated and stated that nobody loved him. [¶] Thereafter I went for a walk to consider the situation and then observed Ken in his card driving down the street. I stopped him and asked where he was going. After suggesting that he and I go on a trip together he stated that he was going to church and started to drive off. I asked why and he pointed to his arm and said 'they told me that this was God's punishment.' [¶] I ran after him asking in essence who had said that but he continued to drive away and that was the last I saw of him."

In his declaration, Walter Nally further stated that he "was present when Katie Thayer testified at her deposition that on the Friday evening she was with Kenneth that he had told her that he intended to commit suicide by way of a shotgun. I was never advised by Katie Thayer prior to may son's death of that fact. She did testify that that week-end [*sic*] she had told Lynn Cory about her conversation with Ken, but no one else. [¶] On the Tuesday following my son's death, Duane Rea in his office accompanied by my son Wally. He told me that he had just gotten out of a board of elders meeting which discussed the problem of Kenneth Nally. He told me that this was not the first time that this had happened, that there had been other suicides and that there were demonic influences surrounding the church."

On April 2, 1979, Lynn Cory took audio tapes given to Kenneth by Pastor MacArthur from the Nally home. The tapes, which were returned upon Walter Nally's request, were by Pastor MacArthur and were entitled: "The Qualities of True Love--Part 1"; "The Qualities of True Love--Part 2"; "The Qualities of True Love--Part 3"; "The Qualities of True Love--Part 4"; Language of Love"; and "The Prominence of Love."

In his declaration, Dr. Stephen Wilson, a psychiatrist, stated, in pertinent part: "I have met and evaluated Walter Nally, his wife Maria and their son Walter Jr. I have also read two (2) publications distributed by GRACE COMMUNITY CHURCH: 'Competent to Counsel' by J. Adams and 'Dying to Live' by Don Smith. [¶] Mr. Nally discussed with me the facts surrounding Kenneth's death and the testimonies illicited [*sic*] in the various depositions arising from his lawsuit. Based on this information I have reached certain conclusions. [¶] First, it is my opinion that Kenneth Nally was suffering from severe mental illness prior to his death. It is apparent by history that there were numerous suicide attempts and that his thinking was considerably disturbed. The attitude and naivete of the members of GRACE COMMUNITY CHURCH toward someone as severely disturbed as Kenneth Nally is incomprehensible to this evaluator. It has been by experience on numerous occasions that Rabbis, Clergy, and other ecclesiastical persons who recognize severe emotional disturbances rapidly involved mental health professions in their care. This was not done by the members of GRACE COMMUNITY CHURCH. Indeed, the consequence of their attempts to salvage a fellow church member resulted in increasing despair and anguish and

ultimately in Kenneth Nally's suicide. [¶] It is my opinion that the members of GRACE COMMUNITY CHURCH mishandled Kenneth and that he had been unduly influenced in his thinking by members of the Church. This undue influence contributed to his inability to leave the Church and seek adequate treatment on his own."

It is further noteworthy that Dr. Wilson is, in essence, making declarations with reference to the standard of care owed to Kenneth by Grace Church. While Dr. Wilson may be qualified to comment upon the standard of care owed to someone by the medical profession, he is not competent to state what the standard of care is for a lay counselor at a church.

In his declaration, the Nallys' attorney, Edward Barker, stated, in pertinent part: "Kathryn Thayer] testified that in March 1979 she and Kenneth had an in depth [*sic*] discussion about his suicide plan. Kenneth expressed to her a fear that if he shot himself he might survive and be deformed. She told him that he would probably not survive a shotgun blast. Kenneth also discussed with her the pros and cons of going off to commit suicide in the woods. Ms. Thayer did not relay any part of this conversation to any member of the NALLY family. Three days later Kenneth committed suicide." [¶] "The deposition of pastor Fred Barshaw was also revealing. He testified that ever since 1978 he believed that Kenneth Nally was 'suicide prone.' My notes also reflects [sic] that pastor Barshaw said that Kenneth Nally's suicide proneness was common knowledge among the pastors at GRACE COMMUNITY CHURCH. Pastor Barshaw said that he had counseled many suicidal people and I believe he said that he had discussed Kenneth Nally's situation with

pastor JOHN MACARTHUR prior to Ken's suicide. Pastor Barshaw said that when he initially counsels a suicidal person he would take a very complete history and he would call the family to discuss the persons background. [1] Carmen Rea, the wife of Defendant past DUANE REA was also deposed. She testified that on March 20th and 22 [*sic*], 1979 she had conversations with Kenneth Nally wherein she concluded that Kenneth Nally was suicidal. At the time Kenneth Nally was staying at the home of pastor JOHN MACARTHUR. She reached the conclusions [*sic*] that it would be a very bad thing if Ken committed suicide white at pastor MACARTHUR's house. She communicated this information to pastor MACARTHUR's wife Pat MacArthur. Carmen Rea also testified that she telephoned WALTER NALLY and advised him that Ken was not getting better and needed to be hospitalized. WALTER NALLY has advised me that his conversation never took place."

In *Bellah v. Greenson* (1978) 81 Cal. App. 3d 614, 146 Cal.Rptr. 535, petn. for hg. denied, S.Ct.Aug.3, 1978, at pages 619 and 620, 146 Cal.Rptr. 535, the court stated: "It has been held that the requisite special relationship does exist in the case of a patient under the care of a psychiatrist and that a psychiatrist who know that the requisite special relationship does exist in the case of a patient under the care of a psychiatrist and that a psychiatrist who know that his patient is likely to attempt suicide has a duty to take preventive measure. Thus, in *Vistica v. Presbyterian Hospital* (1967) 67 Cal.2d 465 [62 Cal.Rptr. 577, 432 P.2d 193], and *Meier v. Ross General Hospital* (1968) 69 Cal.2d 420 [71 Cal.Rptr. 903, 445 P.2d 519], it was held that a wrongful death action would lie where the plaintiffs' decedent committed suicide while undergoing psychi-

atric treatment in a hospital. In *Vistica*, the cause of action was held to exist against the hospital, which was the only named defendant, and in *Meier*, it was found to exist against both the hospital and the decedent's treating physician." However, the *Bellah* court distinguished *Vistica* and *Meier* (both of which involved the suicide of a patient while hospitalized) from a suicide committed by a patient being treated by a psychiatrist on an out-patient basis. Furthermore, the *Bellah* court declined to extend a psychiatrist's duty to warn a specific victim of a patient's assault (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334) to a situation involving a patient's self-inflicted injury.

Here, it is uncontradicted that Kenneth Nally was not living in defendant MacArthur's home at the time of his suicide but was living with his parents, plaintiffs herein. It is further uncontradicted that Kenneth Nally took his own life in a friend's apartment, which apartment, contrary to the allegations in the plaintiffs unverified complaint, was never owned, operated or controlled by Grace Church.

Clearly, if a duty cannot be imposed upon a psychiatrist (trained and paid for analyzing, evaluating and treating patients with serious suicidal tendencies) to prevent the suicide of a patient being treated on an out-patient basis as in *Bellah*, such a duty certainly can not and should not be imposed upon functionaries or lay counselors of various religious faiths. Moreover, as a practical matter, to hold otherwise would pose a dangerous threat to federal and state constitutional guarantees of religious freedom and freedom of speech and could seriously inhibit ministers, priest, and rabbis and other ecclesiastical persons of various religious

denominations from seeking to help a person overcome suicidal tendencies through spiritual guidance.

The majority opinion contains a short passage out of a 12-tape series entitled "Rich Thomson: *Principles of Biblical Counseling*" for the proposition that "a reasonable inference could be drawn that Grace Community Church and each of the individual defendants followed a policy of counseling suicidal persons that, if one was unable to overcome one's sins, suicide was an acceptable and even a desirable alternative to living." This court has never been provided with the full text of these 12 tapes so that we could review this passage in proper context. Instead, we were provided with merely five paragraphs excerpted and transcribed in the declaration of Carol Tsuji. This 12-tape series was not among the list of tapes that Kenneth had in his possession and apparently were designed for the counselors at the church. However, there is no indication that these tapes contained mandatory guidelines for the counselors to follow. The contrary is implied by the following passage regarding referrals to psychologists: "But by job as the biblical counselor is to help him deal with the root cause of the problem, alright [*sic*]. I don't, however, refer to a psychologist or a psychiatrist and this is my own personal conviction because of the stance I come from. I don't refer to a psychologist or psychiatrist even though they're Christian, unless I believe that that person is coming from the new point that the emotional problems are caused the spiritual problems. *That will be your choice of course.*" (Emphasis added.) $ The majority opinion also extracts from Pastor MacArthur's 95-pate deposition a statement that he (Pastor MacArthur) "perhaps contributed to" Kenneth's depression. After reading the series of

questions involved with this statement, I have concluded that the majority opinion improperly implies that Pastor MacArthur acknowledged a large contributory role in Kenneth's depression when, in fact, Pastor MacArthur's statement dealt with the many factors leading to Kenneth's depression, including the "others around him and very close to him," predominately stated to be his his family and his girlfriend.

The majority opinion states that "the complaint also contains a cause of action for intentional infliction of emotional distress (captioned "OUTRAGEOUS CONDUCT") in which it alleged that each of the individual defendants, acting as an agent of the church, exacerbated Kenneth Nally's preexisting feelings of guilt, anxiety, and depression, knowing that Kenneth Nally had suicidal tendencies and that this conduct would increase the likelihood that Kenneth Nally would take his own life."

The majority opinion then bases its reversal on the ground "that triable issues of fact remain as to whether Kenneth Nally's suicide was caused by intentional infliction of emotional distress," [but] acknowledges that case law authority holds that negligent brainwashing is insufficient.

I am unable to find within the four corners of the complaint any allegation of an "intentional infliction of emotional distress." The majority opinion extrapolates these words from count III's designation (OUTRAGEOUS CONDUCT) and paragraph 30's allegation that the defendants' conduct was "done with reckless disregard of the health, safety and well being of Kenneth Nally and constituted outrageous conduct."

In my view, none of the counter affidavits of plaintiffs raise triable issues of fact which show such reckless disregard of the heath, safety and well being of Kenneth Nally as to constitute outrageous conduct. "The rule of liberal construction should not be applied to affidavits in opposition to the motion [for summary judgment], in such a way as to defeat the very purpose of the procedure." (*Snider v. Snider* (1962) 200 Cal.App.2d 741, 752, 19 Cal.Rptr. 709.)

In my view, the majority has incorrectly applied the holdings of *Tate v. Canonica* (1960) 180 Cal.App.2d 898,4 * 28, to the case at bench. In holding that a defendant can be liable in a wrongful death action based upon a suicide that was caused by the defendant's intentional infliction of emotional distress, the court stated: ':'Consequently, we believe that, in a case where the defendant intended, by his conduct, to cause serious mental distress or serious physical suffering, and does so, and such mental distress is shown by the evidence to be 'a substantial factor in bringing about' (Rest., Tort, § § 279, 280) the suicide, a cause of action for wrongful death results, whether the suicide was committed in a state of insanity, or in response to an irresistible impulse, or not. This rule would not apply where the actor*intended to cause injury*, and the injury is a substantial factor in bringing about the suicide, i.e., is really a cause, in fact, of the suicide, i.e., is really a cause, in fact, of the suicide. This does not mean that, in every case where the actor intentionally causes serious mental distress or physical suffering, and this is followed by suicide, the actor is necessarily liable for the suicide. The mental distress or physical suffering may not be, in the particular case, as a matter of fact, a substantial factor in bringing about

the suicide. . ." (*id.*, at p.909, 5 Cal.Rptr. 28; emphasis in original.)

In the case at bench, the uncontroverted evidence was that the church members attempted to dissuade Kenneth from committing suicide and encouraged him to seek psychological assistance. There was no evidence that the church intended for Kenneth to take his own life. The majority bases its holding upon the slenderest of reeds since there was no evidence whatsoever that Kenneth either heard the tape, which allegedly discussed suicide as a favorable alternative, or was told this by any church member.

The majority opinion attempts to distinguish *Tate v. Canonica, supra*, 180 Cal.App.2d 898, 5 Cal.Rptr. 28, by arguing that, unlike *Tate*, reckless disregard of the probability of causing emotional distress was alleged in the case at bench. However, it is absurd and totally contrary to the purpose of the Summary Judgment Act to permit a bare allegation of reckless activity to shelter an action from the Summary Judgment Act in cases, *such as this*, where the uncontroverted evidence is to the contrary.

In holding that a defendant can be liable in a wrongful death action based upon a suicide that was caused by the defendant's negligent infliction of emotional distress, the *Tate* court state: "[T]hat where the negligent wrong only causes a mental condition in which the injured person is able to realize the nature of the act of suicide and has the power to control it if he so desires, the act then becomes an independent intervening force and the wrongdoer cannot be held liable for the death. On the other hand, if the negligent wrong causes mental illness which results in an uncontrollable impulse to commit suicide, then the

wrongdoer may be held liable for the death. Some cases speak of 'insanity,' and of 'delirium or frenzy,' and take the view that if the decedent knew what he was doing, the suicide is an independent intervening cause. We think, in the light of modern knowledge as to mental illness, that this view is too narrow. It should not make any difference that the decedent 'knew what he was doing.' If defendant is to avoid liability, the decedent's act must be voluntary, not in that sense but in the sense that he could, in spite of his mental illness, have decided against suicide and refrained from killing himself." (*id.*, at p. 195, 5 Cal.Rptr. 28.)

In the case at bench, there was no evidence that Kenneth lost the ability to refrain from suicide if he so desired. His suicide therefore served as an independent intervening force.

The majority opinion implies that Pastor MacArthur's declaration is based on something less than the 'personal knowledge" required under Code of Civil Procedure section 437c, as stated in 4 Witkin, California Procedure (1983 Supp.), Proceedings Without Trial, section 184: "Although the requirement of 'admissible evidence' was retained, the section was amended in 1980 to require that objections be made to inadmissible evidence, either in writing or at the hearing, or they 'shall be deemed waived.' (C.C.P. 437c, par. 2 (now C.C.P. 437c(b)).) And if not objected to, such evidence may be relied on by the trial court in ruling on the motion (See Supp., infra, § 196A.) (See 12 Pacific L.J. 291.)" No objections were made in the case at bench. Furthermore, Pastor MacArthur's declaration ended with the statement that he was "ready, willing and able to testify as to the matters contained in this declaration."

The summary judgment act was revised in 1973 in order to, according to one commentator, place "new teeth for an old tiger." (Zack, *New Teeth for an Old Tiger*, 48 Cal.State Bar J. 654.) The commentators anticipated the 1973 revision to lead to fewer reversals of cases in which summary judgment was granted. (See 4 Witkin, Cal. Procedure (1983 Supp.) Proceedings Without Trial, § 199 and 5 Pacific L.J. (1974) *Selected 1973 California Legislation*, pp. 289, 292.)

"A summary judgment which terminates unmeritorious litigation may be a 'drastic remedy' as applied to a plaintiff but at the same time to the same degree it may be just and beneficent to a defendant. [¶] Both the codes and decisional law give a plaintiff every reasonable opportunity to plead and present a cause. Justice requires that a defendant be as much entitled to be rid of an unmeritorious lawsuit as a plaintiff is entitled to maintain a good one. A defendant, though his liability be speculative and asserted contingently, is subject to depositions, interrogatories, pleading, court appearances, attorneys fees and costs of preparing his defense. Though ultimately a winner, for the absence of a meritorious cause against him he may still be a loser, because of the cost in time and money of the process to which he was subjected. His only 'showdowns' to stop unmeritorious claims against him are the general demurrer, seldom effective with the pleading latitude given plaintiffs; and the motion for summary judgment. The motion is not to try the disputed facts; but is to find whether there are any facts to dispute, sufficient to support the complaint or the answer made to it." (*Larsen v. Johannes* (1970) 7 Cal.App.3d 491, 507, 86 Cal.Rptr. 744.)

In the case at bench, the trial court overruled defendants' demurrer to plaintiffs' complaint on June 13, 1980. Defendants file their answer on July 25, 1980, followed by a motion for summary judgment. The plaintiffs filed their points and authorities in opposition to defendants' motion for summary judgment on July 17, 1981, and on that date the trial court advised counsel to have discovery completed within 40 days and continued the matter to October 2, 1981, the date of the hearing. Extensive discovery had already been completed prior to the July 17 date.

Here, in the final analysis, the tragic story that develops is one of a youth who *prior to and subsequent to becoming affiliated with Grace Church* was suffering from emotional problems stemming from his relationships with women and his family. He constantly sought advice from people he respected prior to his affiliation with Grace Church and those connected Grace Church as well as persons in the medical and psychiatric field, yet consistently rejected such advice. His parents, the plaintiffs herein, themselves, were clearly aware of Kenneth's suicidal tendencies and his consistent rejection of help from all sources, and took no steps to have him committed for psychiatric hospitalization against his will.

The plaintiffs have failed to show that the Grace Church deterred Kenneth from seeking professional psychological help. To the contrary, the declarations reveal that Kenneth was urged by the members of Grace Church to cooperate with the psychiatrist during his stay at Verdugo Hills Hospital and thereafter. regarding the intentional infliction of emotional distress, as stated above, there was no evidence that the church acted intentionally or in such

a reckless manner as to constitute intentional conduct to cause injury, or that this injury if any, was a substantial factor in bringing about Kenneth's suicide.

To hold otherwise, under the facts of this case, could have the deleterious effect of opening a virtual Pandora's box of litigation by subjecting *all* of the various religious faiths and their clergy (e.g., ministers of the numerous Protestant denominations; priest of the Roman Catholic faith and the various Eastern Orthodox religions; rabbis of the Jewish faith, orthodox conservative and reform; etc.) to wrongful death actions and expensive full-blown trials simply because they were unsuccessful in their sincere efforts through spiritual counseling to help or dissuade emotionally disturbed member of their congregations, who may be suicide prone from carrying out such a predisposition.[1] I am not saying that a church under any conceivable set of facts could never be liable for the intentional infliction of emotional distress. I am saying that in the case at bench, through the proper and fair application of the statutorily created summary judgment procedures, there are no triable issues of fact upon which to base liability under any theory alleged, including intentional infliction of emotional distress.

For the reasons stated herein, I would affirm the granting of summary judgment.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on February 21, 1989, I served the within *Petition for Writ of Certiorari* in re: "Walter J. Nally and Maria Nally vs. Grace Community Church of the Valley et al.," by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 21, 1989, at Los Angeles, California.

Claude A. Lagardere
(Original signed)

OFFICIAL SEAL
SHERRI L BELLOTTI
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires OCT 2, 1992

Supreme Court, U.S.
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MAR 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1442

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WALTER J. NALLY and MARIA NALLY,
Petitioners,

v.

GRACE COMMUNITY CHURCH OF THE VALLEY,
a Non-Profit Corporation,
JOHN F. MACARTHUR, JR., L. DUANE REA,
RICHARD A. THOMSON, and LYNN CORY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

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RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The petition for certiorari presents no substantial federal question for review. The unanimous decision of the California Supreme Court, rejecting petitioners' proposed new tort liability theories, is based entirely on state law grounds. Petitioners' assertion that the California Supreme Court's decision *not* to expand that state's tort law somehow violates the establishment clause of the First Amendment, is frivolous on its face.

This litigation arose out of the suicide of Kenneth Nally, age 24, who had been a member of respondent Grace Community Church. Nally had been receiving intermittent spiritual counseling from pastors at Grace Community Church during the weeks and months prior to his suicide. During that time, he had also been seeing a hospital psychiatrist, five different physicians, and two other mental health professionals, because of depression. Following his suicide, Nally's parents brought this action against respondents in the California state courts, asking those courts to adopt new California state tort law causes of action for (i) "clergyman malpractice"; (ii) negligent failure of "nontherapists" (not limited to pastors) to "effectively" refer potentially suicidal persons to psychotherapists; and (iii) "outrageous conduct" in the teaching of certain church doctrines to Nally.[1]

The unanimous decision of the California Supreme Court, below, ruled against petitioners' claims on state tort law and evidentiary grounds, holding that California law does not recognize a cause of action for negligent inaction by pastors or other "nontherapist" counselors in failing to prevent suicide by those whom they counsel. Pet. App. at E19-E20. The court below declined, as a matter of state law, to recognize the new tort law duties proposed by petitioners. *Id.* at E22-E27. Finally, the California Supreme Court held that there was insufficient valid evidence to present a jury issue of intentional infliction of emotional distress through "outrageous conduct", under applicable state tort law. *Id.* at E37-E41.

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[1] Petitioners assert that "Respondents encouraged Kenneth to commit suicide by telling him that suicide was an acceptable alternative for someone unable to live with his sins—someone like Kenneth Nally." Petition for Certiorari at 8. This false and irresponsible charge is contrary to the facts as found by the state courts. Both the trial court and the California Supreme Court found that there was *no* competent evidence in the record that Grace Church pastors made any such statement to Nally at any time. *See* Pet. App. E38-E40.

The court therefore reinstated the trial court's grant of nonsuit on all counts of the complaint. *Id.* at E41. Two justices concurred on the ground that, even were petitioners' proposed new duties to be recognized, respondents' conduct did not constitute a breach of such proposed duties, nor was it in any way a proximate cause of Kenneth Nally's sucide. *Id.* at E41-42.[2]

While respondent Church and its pastors had raised, in the alternative, First Amendment objections to the imposition of liability for conduct engaged in (or not engaged in) as a part of religious counseling, the California Supreme Court held that it did not need to reach these issues:

> Our review of the record reveals the trial court correctly granted a nonsuit as to plaintiffs' causes of action. Neither the evidence adduced at trial nor well-established principles of tort law support the Court of Appeal's reversal of nonsuit in this case. As we explain below, we need not address the constitutional issues posed by defendants.

Pet. App. E18. *See also id.* at E6; *id.* at E33; *id.* at E38 ("[I]t is unnecessary to reach the broader constitutional issues raised by the parties . . .").[3]

Finally, petitioners assert that the decision of the California courts *not* to recognize a new cause of action for

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[2] Petitioners have failed to produce the entirety of the concurring opinion, which, in slip opinion form, is 20 pages long. Petitioners in their appendix have reproduced only the first three paragraphs of that opinion.

[3] The petition for certiorari misrepresents the holding of the court below, suggesting that the court relied on the First Amendment for its decision not to impose a duty of care. Petition for Certiorari at 12. This representation is simply false. The decision of the California Supreme Court is clear in its exclusive reliance on state law grounds for decision. *See generally Michigan* v. *Long*, 463 U.S. 1032, 1038 & n.4 (1983) (collecting cases).

clergyman malpractice or negligence, as a matter of state law, itself violates tht federal Constitution. This assertion is meritless on its face. The establishment clause of the First Amendment surely does not require states to invent new tort law causes of action against pastors. Nor does the decision below accord any form of religious preference. The decision does not purport to carve out an exception for pastors from any preexisting legal duty of general applicability. Rather, the California Supreme Court simply declined to create *any* new tort law duty to control the conduct of another individual, outside of a very limited category of existing physician-patient relationships of custody or control. Pet. App. E21-E27.

CONCLUSION

This case involves nothing but questions of state law. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Date: March 9, 1989